Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

AARON C. BORING and CHRISTINE BORING,
husband and wife,

Petitioners,

v.

GOOGLE INC., a California corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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June 1, 2010

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QUESTIONS PRESENTED FOR REVIEW

1) WHETHER, federal judges may conduct *ex parte* "Googling" research to make final determinations as to averment plausibility on a Fed.R.Civ.P. 12(b)(6) motion, and more particularly:
a) when Google itself is the 12(b)(6) movant-defendant; and
b) the *ex parte* adverse facts used to assess Petitioners' claims occurred after the date of filing the pleading, and

AND, WHETHER, such type of conduct so far departs from the accepted and usual course of judicial proceedings that the Supreme Court's supervisory power is required for determination under the intersected authority of: Fed.R.Civ.P 12(b)(6); Fed.R.Evid. 201, and Code of Conduct for United States Judges, Canon 3A(4) (*ex parte* communications) and Canon 3C(1)(a) (recusal for independent knowledge).

2) WHETHER, the standards of pleading set forth in *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009): a) overrule federalism principles of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817; 82 L. Ed. 1188 (1938) permitting a substitution of facts required to state a claim; b) apply equally to prayers for relief under Fed.R.Civ.P. 8(a)(3) as Fed.R.Civ.P. 8(a)(2) conduct averments; c) apply equally to pleading *common law* conditions of mind under Fed.R.Civ.P. 9(b) in the same manner as Fed.R.Civ.P. 8(a)(2) for the ostensible conduct; and d) permit independent *ex parte* "Googling" regarding post-pleading actions to make

determinations of plausibility of the claims made in the pre-existing pleading.

RULE 14.1(B) STATEMENT
LIST OF PARTIES

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

1) AARON BORING, Petitioner and Petitioner,

2) CHRISTINE BORING, Petitioner and Petitioner;

3) GOOGLE, INC., Defendant and Respondent.

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REASONS WHY CERTIORARI
SHOULD BE GRANTED 17

I. THE LEGAL PRINCIPLES AT ISSUE ARE
FUNDAMENTALLY IMPORTANT AND
SYSTEMICALLY PERVASIVE 17

a. The standards for pleading claims, as set forth in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*,[2] are pervasive within federal administrative and judicial dispute resolution processes, access to the courts is a highly important issue, and the issues are accordingly recurring 17

b. Both the U.S. Senate and U.S. House of Representatives have introduced legislation for overruling the Twombly Standard, demonstrating that the questions presented are special, timely, important, socially pervasive, and worthy of attention and correction 18

II. THE FACTUAL CONTEXT IS PERFECTLY TIMED, SUBJECT TO RECUR AND IS PERVASIVELY SOCIALLY RELEVANT . 19

a. Google, the first of its kind, and with the goal to control the World's information, is entering upon the private property while scouring for visual and non-visual data under claim of "license" by "general custom." 19

b. Within the last 20 days, multiple nations throughout the World, including the United States of America, have initiated

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[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[2] *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 173 L.Ed 2d 868 (2009). The combined standards of *Twombly* and *Iqbal*, as the **"Twombly Standard."**

investigations of Google's Street View practices 20

c. The errors of misinterpretation of the Twombly Standard are exemplified by the errors in the lower courts in this case. Google's traverses the earth claiming that the *context* of its entry onto private property is the same *context* as entry by a lost driver turning around. The Third Circuit opined Google's actions are arguably less than a "door knock." 20

III. THE TWOMBLY STANDARD IS CLEAR WHEN PROPERLY ANALYZED; YET, FOR LACK THEREOF, IT IS REDUCED TO CONCLUSORY CITATIONS AND A "CONVINCE THE COURT,"[3] "I KNOW IT WHEN I SEE IT" STANDARD. THE TWOMBLY STANDARD HAS EXPRESS AND IMPLIED FACTORS THAT MUST BE ANALYZED TO PRESERVE THE INTEGRITY OF THE LEGAL PROCESS AND THE ADJUDICATION OF HIGHLY IMPORTANT RIGHTS 26

a. This Court's statement in *Iqbal* for the judiciary to draw upon its "common sense"[4] was not the standard, but it was the express summation of the "*context*-specific task"[5] —

[3] *See* Borings App. Br., at 20; Hay Op., at 31a.

[4] *See, Iqbal*, 129 S. Ct. at 1950, 173 L.Ed. 2d at 884.

[5] Id. (emphasis added).

that is, the presumed *work* — of properly analyzing multiple relevant factors *from the pleading*. 26

b. The Twombly Standard incents logistical games that should not be part of a fair notice pleading standard; to wit, pleading defenses after the fact that change plausibility of the claim in the first instance. 34

IV. EX PARTE "GOOGLING" AND INDEPENDENT FACT-FINDING BY FEDERAL JUDGES ON THE MERITS OF A CASE, PARTICULARLY PURSUANT TO FED.R.CIV.P. 12(b)(6), IS PREJUDICIAL AND CAUSE FOR RECUSAL, *PER SE*; THE ACT UNDERMINES THE INTEGRITY OF THE PROFESSION AND LEGAL PROCESS, *PER SE*. 35

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the opinion and the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Third Circuit, dated January 28, 2010, affirming in part and reversing in part the orders below, are reproduced at App. A, 1a – 18a ["**Jordan-Rendell-Padova Op.**"]. The unpublished opinion is reproduced at *Borings v. Google,* 2010 U.S. App. LEXIS 1891; 38 Media L. Rep. 1306 (3rd Cir. 2010). Rehearing *en banc* was denied by order, dated March 3, 2010, and is reproduced at App. A, 19a – 20a.

The opinion of the United States District Court for the Western District of Pennsylvania, summarily dismissing all claims for lack of plausibility, dated February 17, 2009, is reproduced at App. C, 27a - 42a. ["**Hay Op.**"]. It is reported at *Borings v. Google,* 598 F.Supp. 2d 695 (W.D. Pa. 2009). Reconsideration was denied by order, dated April 6, 2009, reproduced at App. B, 21a - 26a. ["**Hay Recon. Op.**"].

JURISDICTION

The judgment of the panel for the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on January 28, 2010. A petition for rehearing *en banc* was filed by Petitioners, which was denied on March 3, 2010. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule

13.1 and Rule 13.3 because it is filed within 90 days of the entry of the denial for rehearing *en banc*. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1254(1). For purpose of Supreme Court Rule 14.1(g)(ii), the Court of first instance had diversity jurisdiction under 28 U.S.C. 1332.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading
(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

...

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative Statements of a Claim or Defense. A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

...

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Rule 9. Pleading Special Matters

...

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;

(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

STATEMENT OF THE CASE
PREAMBLE

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...."
United Nations Declaration of Human Rights, Article 12, December 10, 1948

"There isn't any privacy, get over it."
Google's Vint Cerf, May 9, 2008, Seattle Post Intelligencer

Freedom begins with the right to be left alone. Privacy is not an incidental right, it is a fundamental

right — if not the seminal principle upon which the United States of America was founded.

Google intentionally entered onto Petitioners' land, without permission, surveilling and collecting data for its profit purpose. If Google can do it, everyone can do it. That is the entire issue in this case. Petitioners and their counsel hold the point tightly, will not lose sight of it, and will not let it go. Google claims its acts are trivial. That is false. Google's acts are seminal. There is a difference.

Google is a technological, economic and social phenomenon. We are vigilant to recognize Google's control over the American infrastructure of technology, economy and social interaction, and our growing dependencies. If Google also controls our private property – the embodiment and reward of our time — there is nothing left, and we become Google's slaves. That is how seeds grow. The intrusions of technology must yield to privacy, or privacy must yield to the intrusions of technology. With potential fully realized, both seeds cannot stand, as equals, in the same place at the same time. One must be first. We cannot serve two masters.

Petitioners did not accept Google's offer merely to remove the surveilled information from Google's mitigation website. Petitioners' time and personal pursuits are not trivial, and Petitioners are highly offended that Google should presume to be master over them. History teaches that a policy of appeasement is not a final solution.

> **It is proper to take alarm at the first experiment on our liberties. We hold this**

prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. ... We revere this lesson too much ... to forget it." [6]

I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations....This danger ought to be wisely guarded against.[7]

We Americans are deeply charitable, and, yet, not so much so to forgive the King for quartering soldiers in our homes — even for a fleeting and trivial single night. On principle alone, it is highly offensive. Even with a spare bedroom. On principle alone, it is highly offensive. The greater the principle, the more jealous. The more jealous, the more offended. Privacy is the first cause of war.

Henry Ford, a great American entrepreneur, said: "The older I get, the less I listen to what people say, and the more I watch what they do." A wise saying. The law may be thought old, but it has evolved well-beyond a brash child's clever arguments that the

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[6] James Madison "Memorial and Remonstrance," Rives and Fendall, Letters and Other Writings of James Madison, 1:163.

[7] James Madison. Jonathan Elliot, ed. The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 5 vols. 3:87. Philadelphia: J.B. Lippincott Company, 1901.

wallet was not buttoned in the person's pocket, so it is okay to take it.

Google argues that it is okay to enter Petitioners' private property, to pass by clearly marked "**Private Road No Trespassing**" signage, to surveil and to collect data. Google, the first of its kind, claims an easement on the World's property from "license" by "general custom." Even the common sense of seeing a swimming pool, where children customarily swim, is not enough to stop Google's continued spying, recording and publication. Google is a corporation — indeed, Google is a technology. It does not eat, it does not sleep, and it does not feel pain.

This is a nation of People. Freedom begins with the right to be left alone. Privacy is not an incidental right, it is a fundamental right — if not the seminal principle upon which the United States of America was founded. Now we test how this Nation, so conceived, will endure.

We pray that this Supreme Court accept this case, deeds caught at the first experiment and arguments untangled. The rulings below cannot stand, the only question is when they will fall. We pray now. And, yet, but for the full errors of the courts below, this case could not have so timely ascended to the final power and authority of this United States Supreme Court, so Providence must see some goodness in it. Amen.

A. Facts Giving Rise to this Case[8]

1. Petitioners own private property which includes their home. They purchased the private property for seclusion. Their home is set back on a graveled private road approximately 1,000 feet from the paved public road junction. Petitioners' home has an adjacent outdoor swimming pool. Consistent with common and judicial experience, Petitioners and their guests, including children, customarily swim with such bodily nakedness as is customary without the expectation of being surveilled or recorded without consent and/or advance notice.

2. Petitioners had an overt statement of their expectation of privacy, "**Private Road No Trespassing**." The residence and swimming pool stand clearly and can be seen from a far distance with sufficient notice that there is no throughway by continuing forward.

3. Petitioners are not celebrities. Petitioners are common people. Petitioners do not have a locked gate, a guard dog standing watch, or a fence surrounding the perimeter their property. At some point of altitude, Petitioners' yard can be seen by satellite and low-flying aircraft. At times, Petitioners invite guests to their home.

4. Petitioners discovered that someone, Google in particular, had entered their private property, disregarding and contrary to the clearly the marked

[8] Boring's 3rd Cir. Opening Appellate Brief, August 25, 2009, ["**Borings App. Br.**"], at 11; District Court Document ["**Dist. Ct. Doc.**"] 18 ["**Amended Complaint**"], at ¶11-12.

"**Private Road No Trespassing**" sign, and, continuing forward with tires crunching, drove up to their home and next to the swimming pool, conducting surveillance with advanced 360° camera technology, which was published worldwide.

5. Google did not turn around when first seeing Petitioners' swimming pool or learning that the road was not a throughway, nor did Google stop surveilling. Google did not even stop surveilling while turning around directly in front of Petitioners' home and swimming pool. Google did not redact the information from the Google surveillance cameras. Google published anyway.

6. Correction and removal of the pictures by electronic facility requires the devotion of personal time, training, electronic connectivity services and equipment for removal.

7. Petitioners were highly offended by Google's acts. The context is a trespass, disregarding and contrary to express "**Private Road No Trespassing**" signage, with data collection, including in the form surveillance,[9] with recording, indexing and worldwide

[9] On or about May 15, 2010, the United States and other countries instituted investigations of data collection by Google Street View drivers regarding wireless data. Petitioners do not yet know whether their wireless data was collected. On May 13, 2010, Google filed a motion for protective order under Fed.R.Civ.P. 26 refusing to respond to discovery regarding its defense of "license." Dist. Ct. Doc. 81 ["**Google's Protection Motion**"] Petitioners' position at Dist. Ct. Doc 88 ["**Borings Opp. to Google's Protection Motion**"]. If Google claims it can take visual data by license, Google can take non-visual data Google argues that the "license" to enter private property is not related to the purpose of entry. *See,* id., ¶6. No guard dog, *carte blanche*.

publication, and the requirement of removal at Petitioners' cost.[10] Moreover, the wonderment of what else and what other surveillance Google possesses.

8. Petitioners do not yet know exactly what data and pictures were taken. Google records, indexes, and publishes worldwide pictures of persons in immodest conditions as part of its Street View program.[11]

9. Google's technological, economic and social power permits it, for the first time in history, to send "Street View" drivers out to traverse the country, packed with data collection, recording and surveillance technology. Among other data collection,[12] Google "automatically record[s] the view that anyone would see while driving on the streets,"[13] and commercially uses the data, including by indexing and automatically publishing the data on the Internet worldwide.[14]

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[10] If you suddenly discover a picture of your bedpost published on the Internet, not having been taken or published by you, it is not necessarily the picture of your bedpost, *per se*, that is offensive. It is the context. Amended Complaint, at ¶11-12.

[11] *See, e.g.*, http://googlesightseeing.com/2009/03/24/naked-people-on-google-street-view. NOTE: There are or may be explicit pictures on this site. *See,* Borings' 3rd. Cir. Petition for Hearing En Banc, February 11, 2010 ["**Borings En Banc Petit.**"], at 65a.

[12] *See, supra,* note 9.

[13] Google's 3rd Cir. Brief, September 24, 2009 ["**Google App. Br.**"], at 1.

[14] *See, supra,* note 9.

10. The data collected by Google could not have been acquired but for trespassing or otherwise entering onto Petitioners' private property.

11. Google does not seek advance information about private roads, because, according to Google's Larry Yu, it "**would have slowed down deployment of Street View.**"[15] It is "common sense" that persons who film and upload video could take steps to protect privacy and obtain consent, as stated by least Google's Vice President, when it suits Google's position:

> **Common sense dictates that only the person who films and uploads a video to a hosting platform could take the steps necessary to protect the privacy and obtain the consent of the people they are filming.**[16]

12. Apparently not to be slowed down, and to achieve deployment of a critical mass of researchable data for its self-interested profit motive,[17] Google does not make Street Maps an opt-in program. There are no call-in lines for senior citizens, no advance

[15] As reported by *The Press Democrat*, http://news.google.com/newspapers?nid_=1673&dat=20080821&id=IbAjAAAAIBAJ&sjid=qSQEAAAAIBAJ&pg=6937,4285450 admitted by Google's Larry Yu; *reproduced* at Dist. Ct. Doc. 67 ["**Borings' Motion to Stay**"], at Exhibit 2; Borings App. Br., at 7.

[16] *CNN/Money* http://money.cnn.com/2010/02/24/technology/Google_Italy_privacy_conviction as admitted by Google's Vice President, Matt Sucherman; *reproduced at* Borings' Motion to Stay, Exhibit 1.

[17] Borings App. Br., at 7.

community notices, no free public computers, no training programs for the less-sophisticated. Data is acquired and commercially used for Google's self-profit until discovered, at which point, Google points to its available post-injury mitigation website.[18]

13 Google's claims it is not wrong to enter onto private property to collect data, including by surveillance, and to record, index and publish the data collected. Google entered the expressly-stated defense of "license"[19] — stating in the record:

> **[Google's] defense is based on the implied consent given by general custom, that absent a locked gate or other express notice not to enter, the public may drive up the driveway or otherwise approach a private home without liability for trespass.**[20]

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[18] Id.

[19] Dist. Ct. Doc. 84 ["**Google Answer**"], ¶29.

[20] Google's Protection Motion (emphasis supplied). If this Court is curious as to how "express notice" reconciles with Petitioners' pleaded "**Private Road No Trespassing**" sign, this Court is invited to Dist. Ct. Doc. 11 ["**Google's Motion to Dismiss**"], at 4 ("Plaintiffs' allegation of a "private road" sign at the top of their street standing alone is insufficient to negate Google's privileged and trivial entry upon Plaintiffs' property "); *see, supra,* note 9; Borings Opp. to Google's Protection Motion, ¶ 6.4).

B. The Initial District Court Proceedings

On April 2, 2008, this action was commenced in the Court of Common Pleas of Allegheny County, Pennsylvania, and removed by Google pursuant to 28 U.S.C. §1441. On February 17, 2009, the District Court granted Google's Motion to Dismiss,[21] dismissing all counts with prejudice, and on April 6, 2009, denying the Borings' Motion for Reconsideration.[22]

In ruling on the privacy count, the District Court concluded, as a matter of law, that it is "hard to believe" that the Petitioners were highly offended by Google's surveillance, recording, indexing and worldwide publication. Judge Hay admitted *ex parte* "Googling."[23] The District Court required to be "convinced."[24] Moreover, Judge Hay performed unreferenced *ex parte* research to draw a serious incorrect statistical inference against Petitioners, to wit: that the lack of claims made against Google tends to prove that the Petitioners' privacy claim was not minimally pleaded pursuant to 12(b)(6).[25] Simultaneously, the District Court concluded that "any attempted amendment would be futile."[26]

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[21] Hay Op., at 27a-41a.

[22] Hay Recon. Op., at 21a-26a.

[23] Hay Op., at 31-32a.

[24] Id., at 31a.

[25] Id., at 32a ("viability," ""inundated"..."frequently consider"). Boring App. Br., at 9.

[26] Id., at 41a, footnote 8.

C. The Appellate Court Proceedings

The Third Circuit affirmed in part and reversed in part.[27] The Third Circuit affirmed the dismissal of all Petitioners' claims and requested relief, with one precise exception not based upon the Twombly Standard.[28] Petitioners' Petition for Rehearing *En Banc* outlines the primary claims of error,[29] also addressed below.

D. The Current District Court Proceedings

There are two pending motions in the District Court of which the undersigned requests this Court to take notice: 1) the Borings' Motion to Stay;[30] and 2) the Borings Opp. to Google's Protection Motion.[31] The request is not for this Court to adjudicate that fray;

[27] Jordan-Rendell-Padova Op., at 1a.

[28] The District Court dismissed punitive damages on the merits, and compensatory damages because there was no physical injury to land. *See,* Hay Op., at 37a; Hay Recon. Op., at 25a. The District Court required Petitioners to substitute $1 (best case) nominal damages to maintain the trespass claim. Thus, the case was dismissed for lack of pleading an element that does not exist for the cause of action. *See,* Borings App. Br., at 22, Borings Appellate Reply Brief, dated October 10, 2009 ("**Borings App. Reply Br.**"), at 14. The Third Circuit reversed that determination, although it affirmed the punitive damage dismissal for failure of plausibility of intention for the intentional trespass claim it upheld. Jordan-Rendell-Padova Op., at 17a.

[29] Borings' Petition for Rehearing *En Banc* ["**Borings En Banc Petit.**"], at 44a-73a.

[30] *See,* note 13, *supra.*

[31] *See,* note 9, *supra.*

the request is because the existence of the disputes, and the arguments made therein, bear upon the reasons why certiorari should be granted. Google is unique.

1) On the deadline date for Petitioners to file their Motion to Stay, April 6, 2010, the undersigned received a Fed.R.Civ.P. 68 Offer of Judgment from Google in the amount of $10.[32] So this Court understands the impact as the undersigned interpreted that act, as stated in its Reply Brief[33] to the District Court:

> **Google seeks forgiveness, rather than permission. And, now it discloses more of its intention that, if you do not forgive it, it will destroy you in Rule 68 costs. That is the truth. Google's factual argument: Google can drive on your private property, past signage, take pictures and publish them worldwide for a profit. Google's legal argument: You cannot sue for punitive damages, you cannot sue for compensatory damages, you can sue for nominal damages of $1, but, if you get $1, being less than $10, it will claim all of the bully costs that a $34B company can generate against a mom and a pop vindicating their legal rights in America. [fn. 2. A dog that bites after the fact is relevant to prove its latent vicious propensity before the fact. Google's intention is relevant to the judiciability of**

[32] Borings Motion to Stay, Exhibit 3.

[33] Dist. Ct. Doc. 71 ["**Borings Motion to Stay Reply**"].

the question presented.] This is the truth.[34]

Every defendant subject to a nominal damage claim merely sends a routine Fed.R.Civ.P. 68 $10 offer, or better, $1.01. How many moms and pops can endure the risk of winning their claim against Google to vindicate legal rights, and still have to pay all Google's costs? This is simply not fair.

2) Google did not enter a defense until after remand. In its answer, it claims the affirmative defense of "license."[35]

a. Google asserted to the courts below that there was no quasi-contractual basis, and now pleads a commercial license defense from the same transaction or occurrence that proves quasi-contractual plausibility.[36]

b. Even if Google offers the unqualified opinion of its legal counsel upon whose advice it relied at the time in question, Google's affirmative defense now proves the plausibility of the intentional disregard claim in the first instance. Google admits that it went onto Petitioners' property, because it asserts it has a right to be there, past signage, to surveil, record, index

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[34] Borings Motion to Stay Reply, at ¶8.

[35] *See*, notes 19-20, *supra*.

[36] *See*, Borings Opp. to Google's Protection Motion, at ¶11.b. (contract under Pennsylvania law). Jordan-Rendell-Padova Op., at 14a; Borings En Banc Petit., at 62a.

and publish, with "license" by "general custom."[37] Google admits plausibility of punitive damages by its own defense. Moreover, Petitioners assert that it is "common sense" that Google's mitigation website supports plausibility of intentional disregard in the first instance, and the lower courts reverse the inference in error.

REASON WHY CERTIORARI SHOULD BE GRANTED

I. THE LEGAL PRINCIPLES AT ISSUE ARE FUNDAMENTALLY IMPORTANT AND SYSTEMICALLY PERVASIVE.

a. The standards for pleading claims, as set forth in *Bell Atlantic Corp. v. Twombly*[38] and *Ashcroft v. Iqbal*,[39] are pervasive within federal administrative and judicial dispute resolution processes, access to the courts is a highly important issue, and the issues are accordingly recurring.

The standards for pleading claims, as set forth in the Twombly Standard, are pervasive within federal administrative and judicial dispute resolution processes. *Twombly* is a 2007 case, and *Iqbal* is a 2009 case. As of the date of this filing, there are more than

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[37] *See*, notes 19-20, and related text.

[38] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[39] *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 173 L.Ed 2d 868 (2009).

10,000 cases throughout the federal judiciary citing to *Twombly* and/or *Iqbal*, with more than 2,000 citations within the Third Circuit. There are more than 1,000 references to the Federal Rules of Civil Procedure throughout the United States Code. In short, the principles espoused by the Twombly Standard are pervasive throughout the judiciary and federal administrative processes. Similarly, access to the federal courts is a highly important right. Any rule of law that permits error in access to federal dispute resolution processes is catastrophic.

b. Both the U.S. Senate and U.S. House of Representatives have introduced legislation for overruling the Twombly Standard, demonstrating that the questions presented are special, timely, important, socially pervasive, and worthy of attention and correction.

Both the U.S. Senate and the U.S. House of Representatives introduced legislation for overruling the Twombly Standard. The Open Access to the Courts Act of 2009 (House Bill 4115) uses a "beyond doubt" standard. The Notice Pleading Restoration Act of 2009 (Senate Bill 1504) reinstates the well-established principles of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The point is not that Congress will, would or could pass such legislation,[40] but that elected officials of both the U.S. Senate and the U.S. House of Representatives have determined that the same questions at issue here

[40] Whether such laws create separation of powers questions are fine points of law and drafting to be addressed in due course.

are special, timely, important, socially pervasive, and worthy of attention to redress an injury perceived.

II. THE FACTUAL CONTEXT IS PERFECTLY TIMED, SUBJECT TO RECUR AND IS PERVASIVELY SOCIALLY RELEVANT.

a. Google, the first of its kind, and with the goal to control the World's information, is entering upon the private property while scouring for visual and non-visual data under claim of "license" by "general custom."

Google's mission is to control the "world's information."[41] Google maintains the world's largest and most comprehensive index of online content. In or about May 2007, Google launched "Street View." Street View drivers drive with panoramic digital cameras on the roofs of passenger cars drive "around automatically filming continuous footage of the view from the streets."[42]

Google entered a claim of "license" by "general custom"[43] to enter private property, to acquire data, surveil, record, index and publish the results.[44] Accordingly, Google is reasonably calculated to continue with a claim of license to enter private property throughout these United States. Because

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[41] Google App. Br., at 9; Amended Complaint, at ¶7 and ¶9.

[42] Id., at 10.

[43] *See*, notes 19-20, *supra*.

[44] Id ; *see* note 9, *supra*.

Google is a technological, economic and social phenomenon, it is imperative that this Supreme Court set forth the final legal standards applicable in this context. The impact of the judicial errors below are socially and jurisprudentially catastrophic.

b. Within the last 20 days, multiple nations throughout the World, including the United States of America, have initiated investigations of Google's Street View practices.

Within the last 20 days from this date, Google has come under investigation by the United States and multiple countries for data collection of Wi-Fi data by Street View on an invasion of privacy basis. The issues regarding Street View data collection is the essence of this case. Google's asserted license to enter land and collect data makes no distinctions for visual and non-visual data. The nature of the judicial determinations below give special importance for review by this Court.[45]

c. The errors of misinterpretation of the Twombly Standard are exemplified by the errors in the lower courts in this case. Google's traverses the earth claiming that the context of its entry onto private property is the same context as entry by a lost driver turning around. The Third Circuit opined

[45] *See, e.g.*, http://www.msnbc.msn.com/id/37157584; http://www.cnbc.com/id/37212331; Borings App. Reply Br., at 11.

Google's actions are arguably less than a "door knock."

Justice Kennedy and the majority in *Iqbal* were clear that the review is a "context-specific task...."[46] Yet, directly contrary, Google argues multiple contexts, none of which are this context, and the Third Circuit began ruling on different hypothetical scenarios. Google argues that it is the same context of an invited "guest," a "police officer",[47] a "lost driver,"[48] that an aerial view from 5,000 feet or so,[49] that Petitioners are coastline mansion celebrities,[50] and that Google is the same as tax collectors, repairmen, deliverymen, neighbors, friends of neighbors.[51] In fact, to defeat the barrage of inapplicable cases that Google raised in its Appellate Brief, Petitioners even offered the pure elementary simplicity of a **bright line** context test:

> Google cites cases and makes arguments that move us away from considering exactly the elements of the context that are the cause for this dispute. We merely add this bright-line to Google's examples and the cited case law: "and was the example or defendant, as the case may be: **a) on an uninvited private-interest**

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[46] *Iqbal*, 129 S. Ct. at 1950, 173 L.Ed 2d at 884.

[47] Google App. Br., at 14.

[48] Id., at 28.

[49] Google App. Br., at 9.

[50] Boring App. Reply Br., at 12.

[51] Google App. Br., at 14.

> **profit mission; and b) recording, indexing and publishing the results throughout the world?"**[52]

The Third Circuit ignored the pure elementary simplicity and clarity of that bright line and started inventing facts.

The Third Circuit directly compared a "door knock" intrusion to Google's surveillance and worldwide publication, and found that Google's conduct was "arguably less intrusive event than a door knock."[53] Respectfully, Petitioners sit writhing with the desire to cross-examine the judiciary on the hypothetical: to wit, did this hypothetical Restatement person who was knocking on the door intentionally pass the plaintiffs' "**Private Road No Trespassing Sign**"; what time of day; did the hypothetical person have a surveillance cameras taking 360° pictures; did the hypothetical person have Wi-Fi interception technology?

The Third Circuit expressly dissected Google's publication from the intrusion, even though publication is a relevant component of the context.[54] In common sense and judicial experience, the "eyes" cannot be removed from the context of a seclusion claim. And, *Borse v. Piece Goods Shop,*[55] does not hold that point. *Borse* says publication is not an element;

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[52] Borings App. Reply Br., at 23 (emphasis in original).

[53] Jordan-Rendell-Padova Op., at 9a.

[54] Jordan-Rendell-Padova Op., at 8a; Borings En Banc Petit., at 55a.

[55] 963 F.2d 611 (3rd Cir. 1992).

it does not follow that lack of publication as an element means to dissect the fact from the context.[56] It is legally incomprehensible under *Borse*, or by the directive of the Twombly Standard, to have done so.[57]

The Third Circuit opined that Google's presence was "fleeting"[58] even though that fact is not pleaded, nor is part of any inference, and the Third Circuit made ultimate summary judgment and trial determinations by adjudications using trial evidentiary "factors" of example cases in different procedural postures.[59] With the limited exception of determining facial ambiguity, as soon as a court begins identifying anything not pleaded, it is on the path to error. The Third Circuit opined:

> **Publication is not an element of the claim, and thus we must examine the harm caused by the intrusion itself.**
>
> **No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering**

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[56] Id.

[57] Id., at 621 ("Unlike the other forms of tortious invasion of privacy, an action based on intrusion upon seclusion does not require publication as an element of the tort."); Borings En Banc Petit., at 55a; *see*, Borings App. Reply Br., at 11 (privacy offense test)

[58] Borings En Banc Petit., at 56a.

[59] Id., at 58a.

into his or her ungated driveway and photographing the view from there.[60]

The Third Circuit: 1) removes the worldwide publication that creates the effective "million eyes of intrusion," and the very spark of the offense; 2) removes the claim of trespass that supports the offense on the privacy intrusion; 3) removes the "**Private Road No Trespassing Sign**"; 4) removes the offense of being surveilled and the wonderment what was surveilled; 5) removes the offense for, and "oppressiveness" of, the requirement to surrender time and training to cleanse Google's database; and 6) removes substantive motive and profit-purpose for commercial advantage.[61]

The Third Circuit stated the standard for punitive damages in Pennsylvania is "intentional, reckless or malicious" conduct[62] and then opined, *as a matter of law,* that "there are no facts suggesting that Google...intentionally disregarded the Borings rights."[63] Petitioners are completely baffled by the Third Circuit, clearly erring, ignoring the "**Private Road No Trespassing**" sign.[64] Signs are important for plausibility. Moreover, the Third Circuit cites to negligence cases to negate punitive damages on an

[60] Jordan-Rendell-Padova Op., at 8a.

[61] Borings App. Br., at 7.

[62] Jordan-Rendell-Padova Op., at 17a.

[63] Id.

[64] See Amended Complaint, ¶11-12.

intentional trespass claim for reasons that are not clear.[65]

If one performs the exercise of redacting the District Court's *ex parte* "googling" and other fact finding, there is, effectively, no analysis. If one performs the exercise of redacting errors derived from apparent misinterpretation of the Twombly Standard by the Third Circuit, there is, effectively, no analysis. Both opinions effectively state that someone cannot be offended because they cannot be offended, and seem to work backwards: the District Court "Googling" and the Third Circuit hypothesizing.

In their Petition for Rehearing En Banc, Petitioners state the errors regarding Unjust Enrichment,[66] particularly in light of Google now having pleaded "license" by "consent by general custom."[67] Regarding the Injunction[68] the Third Circuit identifies a "single, brief" entry, and "since we are told...the offending images have been...removed...."[69] Neither of these facts are anywhere in the Amended Complaint. The Third Circuit fails even to acknowledge that it is plausible that Petitioners have a plausible claim for an

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[65] Jordan-Rendell-Padova Op., 17a, Borings En Banc Petit., at 62a.

[66] Jordan-Rendell-Padova Op., 16a; Borings En Banc Petit., at 63a.

[67] *See*, Borings App. Reply Br., at 17-18.

[68] Jordan-Rendell-Padova Op., at 16a; Borings En Banc Petit., at 63a.

[69] Id.

equitable destruction order for the data acquired while committing the tort.[70]

III. THE TWOMBLY STANDARD IS CLEAR WHEN PROPERLY ANALYZED; YET, FOR LACK THEREOF, IT IS REDUCED TO CONCLUSORY CITATIONS AND A "CONVINCE THE COURT,"[71] "I KNOW IT WHEN I SEE IT" STANDARD. THE TWOMBLY STANDARD HAS EXPRESS AND IMPLIED FACTORS THAT MUST BE ANALYZED TO PRESERVE THE INTEGRITY OF THE LEGAL PROCESS AND THE ADJUDICATION OF HIGHLY IMPORTANT RIGHTS.

a. This Court's statement in *Iqbal* for the judiciary to draw upon its "common sense"[72] was not the standard, but it was the express summation of the "*context*-specific task"[73] — that is, the presumed *work* — of properly analyzing multiple relevant factors *from the pleading*.

If certiorari is granted, Petitioners will set forth to the Third Circuit a number of factors in aid of the

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[70] *See*, Borings En Banc Petit., at 63a.

[71] *See* Borings App. Br., at 20; Hay Op., at 31a.

[72] *See, Iqbal*, 129 S. Ct. at 1950, 173 L.Ed. 2d at 884 (emphasis added).

[73] Id.

analyzing different types of facts with specific factors.[74]

i. All facts are not the same, and cannot be pleaded the same way. There are elemental facts, compound facts and abstract facts.

Twombly is a Fed.R.Civ.P. 8(a)(2) case. In *Twombly*, the essential issue was how to plead a contract, which is a compound (conclusory) fact.[75] For example, pleading a man was drunk is conclusory. For a pleader to plead that the man was drunk, the pleader must necessarily be able to plead the elemental facts which underlie the conclusion: that he had alcohol on his breath and he could not walk a straight line. This ensures, in the context of a compound fact, that there is sufficient minimal legal and factual basis for the conclusory claim asserted. The 7-2 decision reflects the more limited contention regarding the nature of that assessment.

Iqbal is more complicated than *Twombly* because it is effectively made a Fed.R.Civ.P. 8(a)(2) case circuitously through Fed.R.Civ.P. 9(b). In *Iqbal*, the essential issue was pleading a condition of mind. State of mind is part of the averred conduct. Naturally, it is much more difficult to plead elemental facts for abstract conditions of mind, and Fed.R.Civ.P. 9(b) generalizes the pleading requirement. The 5-4 decision reflects contention in this Court regarding the difficulty of denying access to the federal courts for the pleader's inability to plead, at the institution of the

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[74] Borings En Banc Petit., at 50a-54a.

[75] Id., at 49a-55a.

case, anything more than the intention that seems plausibly self-evident from the act itself.

However, there are two critical distinctions in *Iqbal* that are expressly stated in the majority opinion that are overlooked: a) *Iqbal* was a statutory case; and b) the intent standard required by the statute was clearly expressed by this Court to be higher than regular intent, to wit, a "because of" standard.[76] In a manner, *Iqbal* was special within Fed.R.Civ.P. 8(a)(2) only because the statute and related precedent forced an otherwise abstract state of mind averment into a compound fact state.[77] That is, the statute requires that the pleader be able to plead the elemental facts which underlie the conclusion of the statutory term of art, "purposeful discrimination" with "because of" facts.

In this case, Petitioners' case is grounded in pleading two 9(b) "pure" abstract state of mind facts, and each directed to a different party. 1) offense of the Petitioners; and 2) intention of Google. Neither *Twomby* nor *Iqbal* address the simplicity of pleading "pure" 9(b) conditions of mind under the Federal Rules.

[76] *Iqbal*, 129 S.Ct., at 1948, 173 L.Ed. 2d 883 ("Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' ... It instead involves a decisionmaker's undertaking a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.'")

[77] Borings En Banc Petit., at 50a.

ii. Claims made pursuant to statutes must "raise up" specific legislative rights with deference to a separate branch of government.

Since courts decide both common law claims and statutory claims, courts must exercise different disciplines in resolving claims with respect to the source of legal right. Determinations based upon statutory rights require no more or less than the court determining that the pleader has "raised up" and taken hold of the claim of the right granted by the legislature. For example, it may very well be that this Court would have been again 7-2 or better in *Iqbal,* if the intent standard was not based upon the higher statutory standard of *purposeful discrimination*.[78]

On one hand, the majority in *Iqbal* was correct in particular application of the law; this Court was clear that it was required by law to apply the appropriate standard based upon the statute's "extant precedent"[79] for claiming the legal right. On the other hand, the minority in *Iqbal* was correct in general applied consequence. Creating an objective standard for dismissals of or through 9(b) condition of mind cases is rife with applied difficulties in light of adversarial dynamics, and procedural logistics.

Nevertheless, the harder and more complicated cases are vacuuming up cases that should not be baited into motion practice, and if so, should be more analytically stable. In this case, Petitioners' case is

[78] *See*, note 85, *supra*.

[79] Id.

grounded in pleading straight common law causes of action. Neither *Twombly* nor *Iqbal* address the pure simplicity of pleading state common law claims of right under the Federal Rules.

iii. Under principles of federalism and *Erie Railroad Co. v. Tompkins*,[80] federal courts may not change or implicitly add elements to state law claims.

When a federal court reviews the law regarding a state-based common law claim, the federal court must separate the substantive claim element from the procedural pleading standard. For example, a federal court reviewing the common law of the Commonwealth of Pennsylvania, which is a fact-pleading jurisdiction, must take to the *task* of assessing the existing opinions accordingly. For example, whether the state court required pleading taking three aspirins because: a) that is the element; or b) that is required to meet the standard for fact pleading within the jurisdiction. If a federal court requires the aspirins, and the aspirins are not an element but are required for fact-pleading, the federal court creates federal general common law.

In the context of the Twombly Standard, the dismissal of a claim for want of a specific fact is tantamount, by implication, to creating a factual element. The Third Circuit ignored Petitioners' pleaded "**Private Road No Trespassing**" sign, and opined on facts that were not in the pleading. Clearly in error, the Third Circuit referenced an "ungated"

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[80] 304 U.S. 64, 58 S. Ct. 817; 82 L. Ed. 1188 (1938).

driveway as a material condition of dismissal.[81] Legal counsel for the he next would-be plaintiff reads that opinion and must advise, "No go, our smaller but blinking signage is no good, the Third Circuit already ruled that an 'ungated driveway' won't support a claim, *as a matter of law*." The Twombly Standard (improperly interpreted) risks creating elements of state law claims in violation of *Erie* principles.

There is also a distinction between failure to state a claim that is not recognized by law, and a failure to state a claim that is recognized but the facts are not "good enough" to "convince"[82] the trial judge, who, at the same time, is opining that "any attempted amendment would be futile."[83] For example, pleading demands for abstract facts is inherently a slippery slope, as demonstrated by the District Court:

> **[I]t is easy to imagine that many whose property appears on Google's virtual maps resent the privacy implications..."** [84]
>
> "*Resent*" means "to have a feeling of pain or distress..."

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[81] Borings En Banc Petit., at 58a ; Jordan-Rendell-Padova Op., at 9a.

[82] Hay Op., at 31a ("The Petitioners failed to allege facts to convince the Court otherwise.")

[83] Id., at 41a, footnote 8.

[84] Hay Op., at 31a (emphasis added); Borings En Banc Petit., at 55a.

> "*Suffering*" means "the bearing of pain or distress."[85]

The District Court dismissed as a matter of law, opining for lack of plausibility of mental suffering, while subtlety admitting its plausibility.

iv. Twombly and Iqbal are both expressly "conduct" cases. Both courts below extend the principles to prayers for relief and pleading categories of damage claims.

Twombly and Iqbal are both "conduct" cases.[86] Plausibility regarding conduct and damage are conceptually distinct. "Conduct" is the cause of damage, necessarily known at some level to make a claim. "Damage" is the effect of conduct. Damages are not necessarily a historical fact and can be analytically complicated, such as requiring an expert assessment after discovery.

Both courts below *extended* the Twombly Standard to punitive damages at the pleading stage, dismissing the damage claim, *as a matter of law,* without discovery. However, "punitive damages" is not an element of a claim. Not all causes of action have damages as an element to test within the pleadings; even if "damages" is an element, "punitive damages" or other type of damage may not be an element.

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[85] Oxford English Dictionary (Online Subscr.), Second Ed. 1989.

[86] *See, e.g., Iqbal,* 129 S. Ct. at 1949, 173 L. Ed. 2d, at 883 ("when defendant is liable for the misconduct alleged")

The Third Circuit, without support[87] dismissed, *as a matter of law,* the punitive damage count that would rest on the remaining trespass count. As a result, the Third Circuit immunized Google from claims of disregarding property rights, even though Google was claimed to have disregarded the "**Private Road No Trespassing**" signage[88] and, even though Petitioners are sitting on their supportive evidence.[89]

The Third Circuit, again creating an element in violation of *Erie*, indicates that: a) a generally reckless person is immune from the injured person for not being specifically reckless to that injured person; and b) *as a matter of law,* Google could not be recklessly indifferent.[90] The law is based upon intentionality.[91] The Third Circuit denied Petitioners' claim for punitive damages per the Twombly Standard, and cites to *Phillips v. Cricket Lighters,*[92] which is not

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[87] Jordan-Rendell-Padova Op., at 17a.

[88] Id.

[89] *See,* footnotes 15-16, *supra.,* and related text.

[90] Jordan-Rendell-Padova Op., at 17a.

[91] *Feld v. Merriam,* 485 A.2d 742, 747-48 (Pa. 1984) ("Punitive damages may be awarded for...reckless indifference to the rights of others." [Citations Omitted]. Punitive damages must be based on *conduct* which is "'*malicious*,' '*wanton*,' '*reckless*,' '*willful*,' or '*oppressive*'..." [Citations Omitted] Further, one must look to "the *act* itself together with *all the circumstances* including the motive of the wrongdoers and the relations between the parties . . ." (emphasis added) Note "oppressive" in the context of requiring opt-out using one's own time and resources.

[92] 883 A 2d 439, 445 447 (Pa. 2005).

responsive, or actually supports Petitioners' position. Consistent with *Feld*,[93] Petitioners asserted that punitive damages should be reserved to the jury and not dismissed *on the pleadings*; the Third Circuit cited to a post-discovery summary judgment case; that is, *Phillips* survived the pleadings. Fed.R.Civ.P. 8(a)(3) requires only that the pleader plead relief requested.

Accordingly, irrespective of the clear plausibility that Petitioners have in this case, testing plausibility is limited to confirming the elements of the cause of action. To the extent that the movant seeks more than that, *on the pleadings*, the question is not ripe under the Twombly Standard. This comports with the intent of Fed.R.Civ.P. 54.[94]

b. The Twombly Standard incents logistical games that should not be part of a fair notice pleading standard; to wit, pleading defenses after the fact that change plausibility of the claim in the first instance.

The Twombly Standard appears to teach defendants to sandbag plaintiffs by moving for dismissal prior to entering defenses. Google entered a very serious and complicated affirmative defense of "license" by "general custom," and then claims to the District Court, under Fed.R.Civ.P. 11, that it is simple

[93] *See*, note 91, *supra*

[94] *Cf.*, Fed.R.Civ.P. 54(c) ("Every [non default] final judgment should grant relief to which each party is entitled, even if the party has not demanded that relief in its pleading").

trespass case for discovery purposes.[95] Google argued to dismiss Petitioners' quasi-contract count, and then enters a claimed commercial license as part of the same transaction and occurrence.

IV. EX PARTE "GOOGLING" AND INDEPENDENT FACT-FINDING BY FEDERAL JUDGES ON THE MERITS OF A CASE, PARTICULARLY PURSUANT TO FED.R.CIV.P. 12(b)(6), IS PREJUDICIAL AND CAUSE FOR RECUSAL, *PER SE*; THE ACT UNDERMINES THE INTEGRITY OF THE PROFESSION AND LEGAL PROCESS, *PER SE*.

The United States Supreme Court has the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility. *See, Supreme Court* Practice 9th Ed., Eugene Gressman, *et. al.* (BNA 2007), §4.15. Supreme Court Rule 10(a) expressly recognizes the grant of certiorari when a federal decision, "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

In the main body of the District Court Opinion, the District Court admitted "Googling" (by name as such) the Petitioners and their legal on the 12(b)(6) motion on the pleadings, and the District Court expressly

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[95] *See,* note 9, *supra*.

made and stated a finding of facts.[96] The finding of facts was within and between the text of the Court's opining on two separate aspects of Petitioners' single privacy count.[97] Moreover, the "googling" was admittedly using the defendant, Google's, index services, on a motion by the defendant, Google, with a dismissal of all counts in favor of Google.

Petitioners assert that *ex parte* "googling," independent research and fact-finding, particularly on a 12(b)(6) motion, is judicial conduct that is a far departure from the accepted and usual course of judicial proceedings. The context is *per se* prejudicial and cause for recusal from any determination remotely based thereon for the merit determinations.

More specifically, either: a) *ex parte* research is improper; b) *ex parte* research is proper; or c) *ex parte* research is immaterial and condoned when, as suggested and sanctioned by the Third Circuit,[98] the *ex parte* research is arguably sequentially placed in the body of the opinion after a purported conclusion.

In addition to "Googling," the Magistrate Judge also performed unreferenced, uncategorized, independent research to draw a serious incorrect statistical inference against the Borings, to wit: that the lack of *claims* made against Google (apparently leaving it

[96] Amy Hay Op, at 32a-33a. At the time, Petitioners' counsel of record was Attorney Moskal. Attorney Zegarelli appeared upon, and as a result of, the entry of the Hay Op.; *see* Dist. Ct. Doc. 44.

[97] Hay Op., at 31a-32a; Borings En Banc Petit., 67a.

[98] Jordan-Rendell-Padova Opinion, at 10a. (compounded use of defendant's services not addressed).

viable as a service) tends to prove that the Borings' privacy claim was not minimally pleaded pursuant to 12(b)(6).[99] The act was improper, and the reasoning was clearly invalid speculation.[100] Moreover, the fact-finding basis, as of this date, would yield a different factual result.

It should be noted that there may be a reasonable distinction between information, other than on the merits, acquired by "googling" for information that might be otherwise socially acquired, such as at a cocktail party. That is not this case.

A plain reading of the Magistrate Judge's opinion, at 29a, is that the standard of review is a 12(b)(6) motion on the pleadings. "Googling" and *ex parte* research is also a violation of Fed.R.Evid. 201, as well as a violation of the Code of Conduct for United States Judges, Canon 3A(4) (ex parte communications) and 3C(1)(a) (recusal for independent knowledge of disputed facts). The authority to date is supportive.[101]

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[99] Hay Op., at 32a ("[I]t does not appear that the viability of Street Search [sic] has been compromised by requests that images be removed, nor does a search of relevant legal terms show that courts are inundated with - or even frequently consider - privacy claims based on virtual mapping.")

[100] Hay Op., at 32a.

[101] Jordan-Rendell-Padova Opinion, at 10a. (compounded use of defendant's services not addressed). *See, Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?* 16 NO. 2 Prof. Law. 2 (2005) (ABA Center for Professional Responsibility); www.abanet.org/judicialethics /ABA_MCJC_approved.pdf (discussion of the Model Code); *The Temptations of Technology*, Cynthia Gray, the American Judicature Society, 2009); New York Advisory Opinion 08-176

And yet, pursuant to the mandate, and with due notice of Petitioners' position on the "googling," the Magistrate Judge has not voluntarily recused herself. Petitioners must assume that the Magistrate Judge assumes that the legal standard has been "cleansed" by the Third Circuit, and/or the Magistrate Judge otherwise finds no cause for recusal under the Code of Conduct, it being proper to conduct *ex parte* research. Accordingly, the posture of both courts below place the factual, legal and ethical standards at issue for reliance by other federal judges and the Circuits to conduct themselves similarly.

CONCLUSION

This case has virtually every component that merits review: an important question of law; recurring question of law; wide applicability throughout the judiciary and federal dispute resolution process, common misunderstanding on application of standards; grave error in the courts below that contradict the standards set forth by this Court; factual pattern subject to repetition; factual pattern widely socially applicable; a pervasive social question; reconciliation of conflict within the court; reconciliation of potential conflict with Congress by the proposed legislation; new plausibility issues for common law conditions of mind and damages; and resetting or otherwise restating the standard for judicial conduct in the new world of easy information.

(www.nycourts.gov/ip/judicialethics/opinions/08-176.htm); Ind. Code of Judicial Conduct Rule 2.9(C) (no independent investigation extending to all mediums, including electronic).

That said, there are two primary reasons, both of which are reasonably calculated to settle law and procedure: 1) The Twombly Standard, as it now exists in applicable explanation, is grounded in two complex federal statutes. This case permits "rounding out" the rule with the antithesis of state common law, while, at the same time, filling in explanatory details and providing a regimented set of factors to constrain proper assessment. 2) The ease of access to information is bait for curiosity and error. There needs to be a clear directive as to permissible conduct for the judiciary in light of natural curiosity and a plethora of available *ex parte* information.

Petitioners pray that certiorari be granted.

s/Gregg R. Zegarelli, Esq /*
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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2350

[Filed January 28, 2010]

AARON C. BORING; CHRISTINE BORING, husband and wife respectively, Appellants	)
v.	)
GOOGLE INC.	)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 08-cv-00694)
Magistrate Judge: Honorable Amy Reynolds Hay

Submitted Under Third Circuit LAR 34.1(a)
January 25, 2010

Before: RENDELL and JORDAN, *Circuit Judges*, and PADOVA,* *Senior District Judge*.

(Filed: January 28, 2010)

OPINION OF THE COURT

JORDAN, *Circuit Judge*.

Aaron C. Boring and Christine Boring appeal from an order of the United States District Court for the Western District of Pennsylvania dismissing their complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, we affirm in part and reverse in part.

I. Background

On April 2, 2008, the Borings commenced an action in the Court of Common Pleas of Allegheny County, Pennsylvania against Google, Inc., asserting claims for invasion of privacy, trespass, injunctive relief, negligence, and conversion. The Borings sought compensatory, incidental, and consequential damages in excess of $25,000 for each claim, plus punitive damages and attorney's fees.

The Borings' claims arise from Google's "Street View" program, a feature on Google Maps[1] that offers

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* Honorable John R. Padova, United States District Court Senior Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] Google Maps is a service offered by Google that "gives users the ability to look up addresses, search for businesses, and get

free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street. According to Google, "[t]he scope of Street View is public roads." (Appellee's Ans. Br. at 10.) Google allows individuals to report and request the removal of inappropriate images that they find on Street View.

The Borings, who live on a private road in Pittsburgh, discovered that Google had taken "colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy waiver or authorization." (App. at A31.) They allege that their road is clearly marked with a "Private Road, No Trespassing" sign (Appellants' Op. Br. at 11), and they contend that, in driving up their road to take photographs for Street View and in making those photographs available to the public, Google "disregarded [their] privacy interest." (*Id.*)

On May 21, 2008, Google invoked diversity jurisdiction, removed the action to the United States District Court for the Western District of Pennsylvania, and filed a motion to dismiss. The Borings then filed an amended complaint, substituting a claim for unjust enrichment for their earlier

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point-to-point driving directions – all plotted on interactive street maps. . . ." (App. at A5.)

conversion claim.[2] On August 14, 2008, Google again moved to dismiss the Borings' complaint for failure to state a claim.

On February 17, 2009, the District Court granted Google's motion to dismiss as to all of the Borings' claims. The Court dismissed the invasion of privacy claim because the Borings were unable to show that Google's conduct was highly offensive to a person of ordinary sensibilities. *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, 699-700 (W.D. Pa. 2009). The Court dismissed the negligence claim because it found that Google did not owe a duty to the Borings. *Id.* at 701. In dismissing the trespass claim, the Court held that "the Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass." *Id.* at 702. The Court found the unjust enrichment claim wanting because the parties had no relationship that could be construed as contractual and the Borings did not confer anything of value upon Google. *Id.* at 703. The Court also held that the Borings had failed to plead a plausible claim for injunctive relief under Pennsylvania's "demanding" standard for a mandatory injunction, and dismissed the punitive damages claim because the Borings failed to "allege facts sufficient to support the contention that Google engaged in outrageous conduct." *Id.* at 701 n.3, 704. In sum, the Court concluded that the Borings "failed to state a claim under any count" and that "any attempted amendment would be futile." *Id.* at 698, 704 n.8.

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[2] For ease of reference, the amended complaint is referred to herein simply as the "complaint."

The Borings moved for reconsideration, asserting that it was error to dismiss their trespass and unjust enrichment claims, as well as their request for punitive damages. The District Court denied the motion. *Boring v. Google*, Civ. A. No. 08-694, 2009 WL 931181 (W.D. Pa. Apr. 6, 2009). The Court again said that the Borings had failed to allege conduct necessary to support a punitive damages award. 2009 WL 931181, at *2. It also declined to reconsider the dismissal of the unjust enrichment claim because the Borings did not point to any flaw in the Court's disposition of that claim. *Id.* Finally, the Court addressed the Borings' trespass claim only to "eliminate any possibility that the language in [its opinion] might be read to suggest that 'damages are part of a prima facie case for trespass.'" *Id.*, at *1. To clarify, the Court explained that it had dismissed the trespass claim because the Borings had "failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of the trespass" and because they failed to request nominal damages in their complaint. *Id.*, at *1.

The Borings filed a timely notice of appeal from both the District Court's order granting the motion to dismiss and the subsequent denial of their motion for reconsideration.

II. Discussion[3]

A. *Standard of Review*

We conduct a *de novo* review of a Rule 12(b)(6) dismissal of a complaint. *See Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED R. CIV. P. 8(a)(2). To avoid dismissal, the complaint must set forth facts that raise a "plausible inference" that the defendant inflicted a legally cognizable harm upon the plaintiff. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (explaining that a plaintiff must "identify[] facts that are suggestive enough to render [his claim] plausible"); *Phillips*, 515 F.3d at 234 (stating that "a plaintiff must 'nudge [his or her] claims across the line from conceivable to plausible' in order to survive a motion to dismiss") (citations omitted). Conclusory allegations of liability do not suffice. *See Iqbal*, 129 S. Ct. at 1950 (opining that the federal pleading standard "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). We must disregard "formulaic recitation of the

[3] Google timely removed the action to the District Court pursuant to 29 U.S.C. §§ 1441 and 1446. The District Court exercised diversity jurisdiction under 28 U.S.C. § 1332. We have appellate jurisdiction over the final orders of the District Court under 28 U.S.C. § 1291.

elements of a cause of action ...." *Twombly*, 550 U.S. at 555.

A court confronted with a Rule 12(b)(6) motion must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant. *Gross v. German Found. Indus. Initiative*, 549 F.3d 605, 610 (3d Cir. 2008). Legal conclusions receive no such deference, and the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1886) (*cited with approval in Twombly*, 550 U.S. at 555 (citations omitted)). Although a plaintiff may use legal conclusions to provide the structure for the complaint, the pleading's factual content must independently "permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1950. In short, when the well-pleaded complaint does not permit us "to infer more than the mere possibility of misconduct," the pleader is not entitled to relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S.Ct. at 1949).

On appeal, the Borings contend that the District Court erred in dismissing their invasion of privacy, trespass, unjust enrichment, and punitive damages claims, as well as their request for injunctive relief. We address each claim in turn.

B. *Invasion of Privacy*

Pennsylvania law recognizes four torts under the umbrella of invasion of privacy: " [1] unreasonable intrusion upon the seclusion of another; [2] appropriation of another's name or likeness; [3]

unreasonable publicity given to another's private life; and [4] publicity that unreasonably places the other in a false light before the public." *See Burger Blair Med. Assocs., Inc.*, 964 A.2d 374, 376-77 (Pa. 2009) (citing RESTATEMENT (SECOND) OF TORTS §§ 652B-E (1977)). The District Court treated the Borings' complaint as asserting claims for both intrusion upon seclusion and publicity to private life, and it held that the complaint failed to state a claim for either, focusing on the lack of facts in the complaint to support a conclusion that the Street View images would be highly offensive to a reasonable person. The Borings contend that the District Court was wrong to decide, on a 12(b)(6) motion to dismiss, that "a reasonable person would not be highly offended" after having discovered, as the Borings did, that someone "entered onto secluded private property [and] took 360 [degree] pictures ... ." (Appellants' Op Br. at 19.)

i. *Intrusion upon Seclusion*

To state a claim for intrusion upon seclusion, plaintiffs must allege conduct demonstrating "an intentional intrusion upon the seclusion of their private concerns which was substantial and highly offensive to a reasonable person, and aver sufficient facts to establish that the information disclosed would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities." *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 247 (Pa. 2002) (citations omitted). Publication is not an element of the claim, and thus we must examine the harm caused by the intrusion itself. *See Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992).

No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there. The Restatement cites knocking on the door of a private residence as an example of conduct that would not be highly offensive to a person of ordinary sensibilities. *See* RESTATEMENT (SECOND) OF TORTS, § 652B cmt. d. The Borings' claim is pinned to an arguably less intrusive event than a door knock. Indeed, the privacy allegedly intruded upon was the external view of the Borings' house, garage, and pool -- a view that would be seen by any person who entered onto their driveway, including a visitor or a delivery man. Thus, what really seems to be at the heart of the complaint is not Google's fleeting presence in the driveway, but the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.[4]

Significantly, the Borings do not allege that they themselves were viewed inside their home, which is a relevant factor in analyzing intrusion upon seclusion claims. *See, e.g.*, *Pacitti v. Durr*, Civ. A. No. 05-317, 2008 WL 793875, at *26 (W.D. Pa. Mar. 24, 2008) (holding that no reasonable person would find the fact that defendant entered into plaintiff's condominium to speak with a third party highly offensive because plaintiff was not in the condominium at the time),

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[4] Though not pertinent to our decision, we note Google's assertion, which is not seriously contested by the Borings, that the Street View photograph is similar to a view of the Borings' house that was once publicly available online through the County Assessor's website.

aff'd, 310 F. App'x 526 (3d Cir. 2009); *GTE Mobilnet of S. Texas Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 618 (Tex. App. 2001) (finding that "the mere fact that maintenance workers ... look[ed] over into the adjoining yard is legally insufficient evidence of highly offensive conduct.").

The Borings suggest that the District Court erred in determining what would be highly offensive to a person of ordinary sensibilities at the pleading stage, but they do not cite to any authority for this proposition. Courts do in fact, decide the "highly offensive" issue as a matter of law at the pleading stage when appropriate. *See, e.g.*, *Diaz v. D.L. Recovery Corp.*, 486 F.Supp. 2d 474, 475-480 (E.D. Pa. 2007) (denying defendant's motion to dismiss as to plaintiff's invasion of privacy claim because allegations that debt collector called debtor at her home stating he would "repossess all of her household belongings and even her car" stated a claim for invasion of privacy). The Borings also suggest that the Court erred in expressing skepticism about whether the Borings were actually offended by Google's conduct in light of the Borings' public filing of the present lawsuit. However, the District Court's comments came after the Court had already concluded that Google's conduct would not be highly offensive to a person of ordinary sensibilities. Thus, the Court properly applied an objective standard in deciding whether the conduct was highly offensive.[5]

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[5] Google spends much time arguing that the Borings' driveway was not actually a private place sufficient to sustain an invasion of privacy claim. It notes that numerous courts have found no intrusion upon seclusion based upon a view that can be seen from the outside of the home, and points to the fact that images of the Borings' home were already available on the Internet. Because we

In sum, accepting the Borings' allegations as true, their claim for intrusion upon seclusion fails as a matter of law, because the alleged conduct would not be highly offensive to a person of ordinary sensibilities.

ii. *Publicity Given to Private Life*

To state a claim for publicity given to private life, a plaintiff must allege that the matter publicized is "(1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person, and (4) is not of legitimate concern to the public." *Harris by Harris v. Eastern Pub. Co.*, 483 A.2d 1377, 1384 (Pa. Super. Ct. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 652D). For the reasons just described with respect to the intrusion upon seclusion claim, we agree with the District Court that the Borings have failed to allege facts sufficient to establish the third element of a publicity to private life claim, i.e., that the publicity would be highly offensive to a reasonable person. It is therefore unnecessary to address the other three prongs.[6]

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conclude that the alleged conduct would not be highly offensive to a person of ordinary sensibilities, we need not decide whether the Borings' driveway was a "private place" for purposes of an invasion of privacy claim.

[6] We note, however, that the facts revealed may not actually be "private facts," as required by prong 2, because the Borings' property allegedly is or recently was available to public view by virtue of tax records and maps on other Internet sites. *See Strickland v. Univ. of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997) (explaining that "a matter which was of public record [was] not a private fact").

In conclusion, accepting the Borings' allegations as true, their claim for publicity given to private life fails as a matter of law, because the alleged conduct would not be highly offensive to a person of ordinary sensibilities.

C. *Trespass*

The District Court dismissed the Borings' trespass claim, holding that trespass was not the proximate cause of any compensatory damages sought in the complaint and that, while nominal damages are generally available in a trespass claim, the Borings did not seek nominal damages in their complaint. While the District Court's evident skepticism about the claim may be understandable, its decision to dismiss it under Rule 12(b)(6) was erroneous.

Trespass is a strict liability tort, "both exceptionally simple and exceptionally rigorous." *Prosser on Torts* at 63 (West, 4th ed. 1971). Under Pennsylvania law, it is defined as an "unprivileged, intentional intrusion upon land in possession of another." *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing *Kopka v. Bell Tel. Co.*, 91 A.2d 232, 235 (Pa. 1952)). Though claiming not to have done so, it appears that the District Court effectively made damages an element of the claim, and that is problematic, since "[o]ne who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest." RESTATEMENT (SECOND) TORTS § 163; *see also Corr. Med. Care, Inc. v. Gray*, Civ. A. No. 07-2840, 2008 WL 248977, *11 (E.D. Pa. Jan. 30,

2008) (holding that a complaint alleging that defendants entered into plaintiffs' home on specified dates was "sufficient to survive a motion to dismiss under Pennsylvania trespass law.").

Here, the Borings have alleged that Google entered upon their property without permission. If proven, that is a trespass, pure and simple. There is no requirement in Pennsylvania law that damages be pled, either nominal or consequential.[7] *Cf.* 1 STEIN ON PERSONAL INJURY DAMAGES § 1.3 (3d ed. 2009) ("harm is not a prerequisite to a cause of action [for trespass,] and nominal damages can be awarded [even though] there has been and will be no substantial harm."); 75 AM. JUR. 2D *Trespass* § 112 (2009) ("[I]n the absence of proven or actual damages, plaintiffs are entitled to nominal damages in an action for trespass." (citations omitted)). It was thus improper for the District Court to dismiss the trespass claim for failure to state a claim. Of course, it may well be that, when it comes to proving damages from the alleged trespass, the

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[7] The District Court cited to a single case from 1899 to support its claim that plaintiffs in a trespass case are required to plead nominal damages. However, the case it cited was not a trespass case. *See Morris & Essex Mut. Coal Co. v. Del., L. & W. R. Co.*, 42 A. 883, 884 (Pa. 1899). In fact, that case is expressly inapplicable to this case. *See id.* ("The whole proceeding was to recover damages based, not upon a wrongful invasion of plaintiff's [property] rights, but upon an act of assembly which authorized the taking of the property.") Similarly, none of the cases cited by Google in its brief are trespass cases. In fact, Google itself indicates the possibility that we may have to remand the case to proceed with a nominal damages trespass claim. While it may be true that for some claims, the failure to seek nominal damages waives a claim for nominal damages, that is not the case with trespass claims.

Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day.[8] For now, it is enough to note that they "bear the burden of proving that the trespass was the legal cause, i.e., a substantial factor in bringing about actual harm or damage" *C & K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982), *rev'd in part on other grounds*, 704 F.2d 690, 699 (3d Cir. 1983), if they want more than a dollar.

D. *Unjust Enrichment*

To succeed on a claim of unjust enrichment, a plaintiff must allege facts sufficient to establish "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006) (quotation omitted). Typically, with an unjust enrichment claim, a "plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contact," and the law then implies a quasi-contract which requires the defendant to compensate the plaintiff for the value of the benefit conferred. *See Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 936 (3d Cir. 1999) (citations omitted); *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 998-99 (3d Cir. 1987).

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[8] We imply nothing about whether the claim would survive summary judgment, either as to liability or damages, or about the limits on proof that may be appropriate.

The District Court dismissed the Borings' unjust enrichment claim after finding that they had not alleged any relationship between themselves and Google that could be construed as contractual, and because "it cannot be fairly said that the Borings conferred anything of value upon Google." (App. at A12-A13.) The Court further held that the unjust enrichment claim failed because the Borings had not adequately alleged any other tort, and Pennsylvania does not recognize unjust enrichment as a stand-alone tort.

We agree that the facts alleged by the Borings provide no basis for an unjust enrichment claim against Google. The complaint not only fails to allege a void or unconsummated contract, it does not allege any benefit conferred upon Google by the Borings, let alone a benefit for which the Borings could reasonably expect to be compensated. The complaint alleges that Google committed various torts when it took photographs of the Borings' property without their consent. The complaint does not allege, however, that the Borings gave or that Google took anything that would enrich Google at the Borings' expense. An unjust enrichment "claim makes sense in cases involving a contract or a quasi-contract, but not, as here, where plaintiffs are claiming damages for torts committed against them by [the] defendant[]."[9] *Romy*

[9] Because we find that the Borings stated a claim for trespass (*see supra*, Section II.C.ii) and thus survived a 12(b)(6) motion to dismiss as to that claim, we need not address whether unjust enrichment is a stand-alone tort under Pennsylvania law. Instead, we hold that the Borings have failed to state a claim for unjust enrichment, regardless of whether it is a stand-alone tort, because they have failed to allege facts sufficient to establish a benefit

v. Burke, No. 1236, 2003 WL 21205975, at *5 (Pa. Com. Pl. Philadelphia May 2, 2003).

E. *Injunctive Relief*

Pennsylvania law provides that in order to establish the right to injunctive relief, a plaintiff must "establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested." *Kuznik v. Westmoreland County Bd. of Comm'rs*, 902 A.2d 476, 489 (Pa. 2006) (citing *Harding v. Stickman*, 823 A.2d 1110, 1111 (Pa. Commw. Ct. 2003)). An injunction is an extraordinary remedy. *See Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa. Super. Ct. 2007).

The District Court held that the complaint failed to set out facts supporting a plausible claim of entitlement to injunctive relief. We agree that the Borings have not alleged any claim warranting injunctive relief. The complaint claims nothing more than a single, brief entry by Google onto the Borings' property. Importantly, the Borings do not allege any facts to suggest injury resulting from Google's retention of the photographs at issue, which is unsurprising since we are told that the allegedly offending images have long since been removed from the Street View program.

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conferred upon Google by the Borings. Thus, on remand, the Borings are not entitled to recover under their unjust enrichment claim.

F. *Punitive Damages*

Pennsylvania law provides that a defendant must have engaged in "outrageous" or "intentional, reckless or malicious" conduct to sustain a claim for punitive damages. *Feld v. Merriam*, 485 A.2d 742, 747-48 (Pa. 1984). Indeed, "punitive damages cannot be based upon ordinary negligence." *Hutchinson ex rel. Hutchinson v. Luddy*, 946 A.2d 744, 747 (Pa. Super. Ct. 2008).

The Borrings' complaint fails to allege conduct that is outrageous or malicious. There is no allegation that Google intentionally sent its driver onto their property or that Google was even aware that its driver had entered onto the property. Moreover, there are no facts suggesting that Google acted maliciously or recklessly or that Google intentionally disregarded the Borings' rights.

The Borings argue that a claim for punitive damages must always be determined by a jury, after discovery. But courts do indeed dismiss claims for punitive damages in advance of trial. *See Phillips v. Cricket Lighters*, 883 A.2d 439, 445, 447 (Pa. 2005) (reversing a denial of summary judgment as to a punitive damages claim because "[a] showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed"); *Feld*, 485 A.2d at 748 (holding that submission of punitive damages issue to jury was error).[10] And,

[10] Appellants rely on two cases to argue that punitive damages must always be determined by a jury after discovery: *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989), and *Jacque v.*

under the pleading standards we are bound to apply, there is simply no foundation in the complaint for a demand for punitive damages. *Cf. Iqbal*, 129 S. Ct. at 1950 (explaining that while a plaintiff may use legal conclusions to provide the structure for the complaint, the pleading's factual content must independently "permit the court to infer more than the mere possibility of misconduct"); *Twombly*, 550 U.S. at 556 (explaining that a plaintiff must "identify[] facts that are suggestive enough to render [his claim] plausible").

III. Conclusion

For the foregoing reasons, we will affirm the District Court's grant of Google's motion to dismiss the Borings' claims for invasion of privacy, unjust enrichment, injunctive relief, and punitive damages. We reverse, however, with respect to the trespass claim, and remand with instructions that the District Court permit that claim to go forward.

Steenberg Homes, Inc., 563 N.W. 2d 154 (Wis. 1997). *Kukbride* addressed whether a punitive damages award must bear a reasonable relationship to the compensatory award, rather than addressing what kind of conduct must be alleged in order to survive a 12(b)(6) motion to dismiss on a punitive damages claim. 555 A.2d at 801. The *Jacque* case, in addition to having no binding authority on our Court, addressed whether a punitive damages claim may be awarded in connection with a trespass claim, where nominal damages had been awarded and the trespass was committed "for an outrageous purpose but no significant harm resulted." 563 N.W.2d at 161. Thus, that court did not hold that the issue of punitive damages must always go to the jury.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2350

[Filed January 28, 2010]

AARON C. BORING; CHRISTINE BORING, husband and wife respectively,
Appellants

v.

GOOGLE INC.

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. No. 08-cv-00694)
Magistrate Judge: Honorable Amy Reynolds Hay

Submitted Under Third Circuit LAR 34.1(a)
January 25, 2010

Before: RENDELL and JORDAN, *Circuit Judges*, and PADOVA,* Senior District Judge.

* Honorable John R. Padova, United States District Court Senior Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 25, 2010. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order entered by the District Court on February 17, 2009 and April 6, 2009 is AFFIRMED in part and REVERSED in part, in accordance with the opinion of this Court. Each party to bear its own costs.

ATTEST:

/s/Marcia M. Waldron,
Clerk

Date: January 28, 2010

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 08-694

[Filed April 6, 2009]

AARON C. BORING; CHRISTINE BORING, Plaintiffs	)
vs.	)
GOOGLE INC., Defendant	)

Magistrate Judge Amy Reynolds Hay

MEMORANDUM OPINION

Hay, Magistrate Judge

The Court addresses here the Plaintiffs' Motion for Reconsideration (Doc. 45) of the Court's Order (Doc. 43) granting Defendant's Motion to Dismiss the Amended Complaint (Doc. 22) with prejudice.[1] "The

[1] The Plaintiffs' Brief makes clear that they have abandoned their privacy and negligence claims, as well as their request for

purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) (citation omitted). "Because of the interest in finality, at least at the district court level, motions for reconsideration should be granted sparingly; the parties are not free to relitigate issues the court has already decided." Williams v. City of Pittsburgh, 32 F. Supp.2d 236, 238 (W.D.Pa.1996).

The Plaintiffs argue that the Court committed an error of law when it dismissed their trespass claim.[2] The Court considers this argument in order to eliminate any possibility that the language of its Memorandum Opinion addressing the Defendant's

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injunctive relief and attorneys fees. "In good faith and for judicial efficiency, Plaintiff [sic] request that the . . . Judge . . . reinstate the Counts: II (Trespass) and V (Unjust Enrichment) with the claim for punitive damages. (Doc. 45 at 10).

[2] Their statement of error is not nearly as straightforward as the Court's discussion suggests. The substance and tenor of the Plaintiffs' argument is illustrated by this hyperbolic statement in their Brief.

> The Court tells Google that it is okay to enter onto a person's private property without permission. I would not teach that rule to my child.
>
> This Court's ruling makes our private property a Google Slave; our Property is no longer our own: it is forced to work for another, against its will, without compensation, for the profit of another. The Federal Court should free slavery, not create it.

(Doc. 45 at 3).

Motion to Dismiss might be read to suggest that damages are part of a prima facie claim for trespass. Clearly, under Pennsylvania law, they are not. The tort is complete once there has been an unprivileged intentional entry upon property in the possession of another. See Graham Oil v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994). What the Court *did* hold was that the Borings, in their Amended Complaint, failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of the trespass. Furthermore, although under Pennsylvania law, a Plaintiff who establishes that a trespass occurred is entitled to nominal damages, see Morris & Essex Mut. Coal Co. v. Delaware, L. & W. R. Co., 42 A. 883, 884 (Pa. 1899), the Court found that this entitlement was not sufficient to save the trespass claim from dismissal under Fed. R. 12(b)(6). This was because the Borings did not, as Pennsylvania law requires, request nominal damages in the Amended Complaint.

While a Plaintiff may be entitled to recover nominal damages, he must first establish that he seeks them. See Bastian v. Marienville Glass Co., 126 A. 798 (Pa. 1924) (affirming trial court's binding instruction for defendant because plaintiff failed to provide proof of actual damages, and although nominal damages may have been permitted, plaintiff failed to request them). See also Thorsen v. Iron and Glass Bank, 476 A.2d 928 (Pa. Super. 1984) (affirming trial court's grant of summary judgment because plaintiff failed to request nominal damages and failed to show any harm from the alleged breach). In Cohen v. Resolution Trust, No. 03-2729, 107 Fed. Appx. 287, (3d Cir. 2004), the Court of Appeals wrote: "Here, plaintiffs requested only compensatory and punitive damages in their amended

complaint, and nothing in the record suggests that they asked to amend their complaint to include nominal damages. Accordingly, the court did not err in refusing to award nominal damages." Id. at 289-290.

The Borings, too, failed to mention nominal damages in their Amended Complaint. They admitted as much in their Memorandum in Opposition to the Motion to Dismiss (Doc. 25):

> [A]side from any compensatory damages in relation to the trespass . . . Plaintiffs could seek nominal damages and punitive damages in relation to a trespass action. Plaintiffs have already sought punitive damages in relation to the trespass, and to the extent Defendant asserts that nominal damages have not been properly pled, Plaintiffs *could amend* the complaint.

Id. at 19 (emphasis added). Plaintiffs did not, however, file a second Amended Complaint, nor did they seek leave to do so. In this context, the Court's decision not to consider the issue of nominal damages was fully consistent with Pennsylvania law, and does not provide a basis for granting the pending Motion for Reconsideration.

The Plaintiffs also challenge the Court's conclusion that the allegations set out in the Amended Complaint do not approach the type of outrageous conduct that warrants a punitive damages award under Pennsylvania law. The Borings' account of Google's conduct has transmogrified during the course of this litigation. In their Amended Complaint (Doc. 18) - to which the Court must confine its attention in

evaluating a Motion to Dismiss - the Plaintiffs alleged that "the scope of Google Street View was all paved, non-private roads." Id. at ¶ 7. The allegations relating to the trespass as set out in the Amended Complaint differ dramatically from the account of Google's activity in the Plaintiffs' Brief in Support of the Motion for Reconsideration (Doc. 45), where they state:

> Google's argument that punitive damages are not warranted because Plaintiffs do not point to aggravating or outrageous conduct found in the complaint is factually conclusory in that the illegal entry upon property, pursuant to a calculated scheme of approach, is a crime and clearly warrants punitive damages.

Id. at 8-9. This unsupported alteration in the characterization of Google's conduct does not change the Court's conclusion that the allegations in the Amended Complaint fail to establish a plausible claim of entitlement to punitive damages.

Although the Plaintiffs ask that their claim for unjust enrichment be reinstated, they do not address or point to error in the Court's disposition of that claim. Consequently, the Court does not consider that issue here, adhering to the analysis in the Memorandum Opinion addressing Google's Motion to Dismiss.

Because it finds no ground upon which to do otherwise, the Court will deny the Plaintiffs' Motion for Reconsideration (Doc. 45) in its entirety. An appropriate Order follows.

/s/ Amy Reynolds Hay
United States Magistrate Judge

Dated : 6 April, 2009

cc: Counsel of Record via CM-ECF

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 08-694

[Filed February 17, 2009]

AARON C. BORING, CHRISTINE BORING, Plaintiffs,	)
vs.	)
GOOGLE INC., Defendant.	)

Magistrate Judge Amy Reynolds Hay

MEMORANDUM OPINION

HAY, Magistrate Judge

In April 2008, Pennsylvania residents, Aaron and Christine Boring ("the Plaintiffs" or "the Borings"), filed a five count Complaint against Google, Inc. ("the Defendant" or "Google"), a Delaware corporation, in the Court of Common Pleas of Allegheny County, Pennsylvania. The Borings alleged entitlement to compensatory and punitive damages based on four tort-based causes of action: (1) Count I - invasion of

privacy; (2) Count II - trespass; (3) Count IV - negligence; and (5) Count V - conversion. In Count III, the Plaintiffs asserted a claim for temporary and permanent injunctive relief. Invoking this Court's diversity jurisdiction, the Defendant effected timely removal. The Borings then filed an Amended Complaint (Doc. 18), substituting an unjust enrichment claim for the conversion claim at Count V. The Defendant's Motion to Dismiss the Amended Complaint (Doc. 22) pursuant to Fed. R. Civ. P. 12(b)(6) is pending. Because the Plaintiffs have failed to state a claim under any count, the Amended Complaint will be dismissed.

Background

Google describes itself as the operator of a "well-known internet search engine" that maintains the world's largest and most comprehensive index of web sites and other online content. (Doc. 11 at 4). One of the services offered by Google is comprehensive online map access. "Google Maps gives users the ability to look up addresses, search for businesses, and get point-to-point driving directions – all plotted on interactive street maps" made up of satellite or aerial images. Id. at 4-5. In May 2007, Google introduced "Street View" to its map options. Street View permits users to see and navigate within 360 degree street level images of a number of cities, including Pittsburgh. These images were generated by Google drivers who traversed the covered cities in passenger vehicles equipped with continuously filming digital panoramic cameras. Id. at 5. According to Google, "the scope of Street View was public roads." Id. Google included in the Street View program an option for

those objecting to the content of an image to have it removed from view. (Doc. 11 at 5).

The Borings, who live on a private road north of Pittsburgh, discovered that "colored imagery" of their residence, outbuildings, and swimming pool, taken "from a vehicle in their residence driveway . . . without . . . waiver or authorization," had been included on Street View. (Doc. 18 at ¶ 9). The Plaintiffs allege that the road on which their home is located is unpaved and clearly marked with "Private Road" and "No Trespassing" signs. Id. at ¶ 11. They contend that Google, in taking the Street Search pictures from their driveway at a point past the signs, and in making those photographs available to the public, "significantly disregarded [their] privacy interests." Id. The Court addresses the sufficiency of the Borings' claims seriatim.

Standard of Review

In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, (2007), the Supreme Court held that a complaint challenged pursuant to Fed. R. Civ. P. 12(b)(6) must be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." Id. at 1974. Said another way, a plaintiff is required to plead facts sufficient to "raise a right to relief above the speculative level." Id. at 1965. The court is not obligated to accept inferences unsupported by facts set out in the complaint, see California Pub. Employees' Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citing Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)), and is not required to accept legal conclusions framed as factual allegations. Bell Atlantic Corp., 127 S.Ct. at 1965. See

also Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (explaining, citing Twombly, that "labels, conclusions, and a formulaic recitation of the elements of a cause of action" do not suffice; noting that the complaint "must allege facts suggestive of [the proscribed] conduct," and requiring plaintiff to allege "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s] of his claim"). In evaluating the complaint, the Court views all facts and reasonable inferences drawn therefrom in the light most favorable to the Borings. Odd v. Malone, 538 F.3d 202, 205 (3d Cir. 2008).

Analysis

A. The Claims for Invasion of Privacy

The action for invasion of privacy embraces four analytically distinct torts: (1) intrusion upon seclusion; (2) publicity given to private life; (3) appropriation of name or likeness; and (4) publicity placing a person in a false light. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 n.9 (3d Cir. 1992). The Borings do not identify the tort or torts underlying their invasion of privacy claim. Appropriation of name or likeness and false light publicity clearly do not apply. Since the remaining torts have an arguable relationship to the facts alleged, the Court will discuss each.

1. Intrusion Upon Seclusion

This tort is established where a plaintiff is able to show: (1) physical intrusion into a place where he has secluded himself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3)

some other form of investigation into or examination of the plaintiff's private concerns. Id. at 621. "Liability attaches only when the intrusion is substantial and would be highly offensive to 'the ordinary reasonable person.'" Id. (quoting Harris by Harris v. Easton Publ'g Co., 483 A.2d 1377, 1383 -84 (1984)). See also Restatement (Second) of Torts §652B (same). In order to show that an intrusion was highly offensive, the plaintiff must allege facts sufficient to establish that the intrusion could be expected to cause "mental suffering, shame, or humiliation to a person of ordinary sensibilities." Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 809 A 2d 243, 248 (Pa. 2002) (quoting McGuire v. Shubert, 722 A.2d 1087 (Pa. Super. 1988)). This is a stringent standard. Wolfson v. Lewis, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996). While it is easy to imagine that many whose property appears on Google's virtual maps resent the privacy implications, it is hard to believe that any - other than the most exquisitely sensitive - would suffer shame or humiliation. The Plaintiffs have not alleged facts to convince the Court otherwise.

Although the Plaintiffs have alleged intrusion that was substantial and highly offensive to them and have asserted that others would have a similar reaction, they have failed to set out facts to substantiate this claim. This is especially true given the attention that the Borings have drawn to themselves and the Street View images of their property. The Borings do not dispute that they have allowed the relevant images to remain on Google Street View, despite the availability of a procedure for having them removed from view. Furthermore, they have failed to bar others' access to the images by eliminating their address from the pleadings, or by filing this action under seal.

"Googling" the name of the Borings' attorney demonstrates that publicity regarding this suit has perpetuated dissemination of the Borings' names and location, and resulted in frequent re-publication of the Street View images. The Plaintiffs' failure to take readily available steps to protect their own privacy and mitigate their alleged pain suggests to the Court that the intrusion and the their suffering were less severe than they contend.

2. Publicity Given to Private Life

The Amended Complaint, insofar as it purports to state a claim for publicity given to the Borings' private life, is similarly flawed. Under Pennsylvania law, this claim comprises four elements:(1) publicity; given to (2) private facts; (3) which would be highly offensive to a reasonable person; and (4) are not of legitimate public concern. See Harris by Harris, 483 A.2d at 1384. Because the Plaintiffs have not alleged facts sufficient to establish the third element of this tort, the Court need not address the other requirements. As the Court has already discussed, the Amended Complaint is devoid of facts sufficient to indicate that the photographs of the Borings' property revealed private facts such that a reasonable person would be highly offended. The Plaintiffs do not allege that their situation is unique or even unusual. Yet, it does not appear that the viability of Street Search has been compromised by requests that images be removed, nor does a search of relevant legal terms show that courts are inundated with - or even frequently consider - privacy claims based on virtual mapping. Furthermore, as was true with the intrusion upon seclusion claim, the Plaintiffs have done little to limit - and seem to have heightened intentionally - public

interest in and access to the allegedly private information.[1]

B. The Negligence Claims

In order to state a claim based on negligence, a plaintiff must allege facts sufficient to show: (1) a duty of care; (2) breach of the duty; (3) actual loss or damage; and (4) a causal connection between the breach of duty and the resulting injury. Farabaugh v. Pa. Turnpike Com'n, 911 A.2d 1264, 1272-73 (Pa. 2006) (citing R.W. v. Manzek, 888 A.2d 740, 746 (2005)). The Borings' negligence claims are set out in the Amended Complaint as follows:

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[1] This claim is deficient in other respects. The facts do not establish that the views shown of the Plaintiffs' property constituted private information. What was disclosed was already available to the public by virtue of tax records and maps compiled by other internet search engines. (Doc.22 Ex. A-G). Aside from some additional detail, the Plaintiffs do not specify what in the Google images was not ascertainable from or was more outrageous than information included in public records or on other internet sites prior to the unveiling of Street Search.

Even if the information had been disclosed for the first time on Google, it does not comport with the definition of "private facts" contained in the Restatement of Torts. According to the Restatement, private facts have been disclosed "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency . . . ." Restatement (Second) of Torts § 652D cmt. h. The Borings have not alleged facts to support the contention that Google transgressed standards of decency, or published information that was of no public concern.

> Defendant has a duty of care to the public to utilize proper internal controls to avoid trespassing on private property. Additionally, Defendant has a duty to utilize proper methods and controls to avoid publishing data over Street View, irrespective of how the date is [sic] captured, for the whole world to see without some advance method of filtering. Defendant breached its duty by its aforesaid actions. Plaintiffs have been injured, and such breach was the proximate cause of Plaintiffs' injuries.

(Doc. 18 at ¶ 24). These allegations are insufficient to state a viable claim. Simply stating that there is or ought to be a duty is not enough; the duty alleged must be one recognized by the law. See Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 280 (Pa. 2005) (declaring it "well established that 'a cause of action in negligence requires allegations that establish the breach of a *legally recognized* duty or obligation that is causally connected to the damages suffered by the complainant.'") (citation omitted) (emphasis added). In certain circumstances, the Court may recognize a "new" duty on which a negligence claim may be based. See e.g., Althaus ex rel. Althaus v. Cohen, 756 A.2d 1169 (2000).[2] The Plaintiffs, however, do not mention the relevant factors.

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[2] "The determination of whether a duty exists in a particular case involves the weighing of several discrete factors: 1) the relationship between the parties, 2) the social utility of the actor's conduct, 3) the nature of the risk imposed and foreseeability of the harm incurred, 4) the consequences of imposing a duty upon the actor, and 5) the overall public interest in the proposed solution." Althaus, 756 A.2d at 1169.

Moreover, it does not appear that these factors militate in favor of finding a duty.[3]

C. Trespass

Pennsylvania law defines trespass as "an unprivileged, intentional intrusion upon land in

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[3] The Borings' negligence claim is also problematic in that it is grounded, in part, on damages attributable to "mental suffering." (Doc. 18 at ¶ 14). Recovery for emotional distress stemming from a defendant's negligence is available only where the claim includes physical injury to the plaintiff or, in limited circumstances, where the plaintiff witnesses injury to another. See Megt v. Cabot Corp., 449 F.3d 502, 519 (3d Cir. 2006) (collecting Pennsylvania cases). Neither of these conditions is met here.

The Plaintiffs have also failed to state a claim for punitive damages in that they do not allege facts sufficient to support the contention that Google engaged in outrageous conduct. Ordinary negligence cannot be the basis for an award of punitive damages. See Hutchison ex rel. Hutchison v. Luddy, 946 A.2d 744, 747 (Pa. Super. 2008).

The Court disagrees with the Defendant's argument that diminution in the value of property is not recoverable in negligence. Pennsylvania's economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995). The Borings' negligence claim is not based on a contract. The Court's rejection of the Defendant's argument is irrelevant, however, in view of the fact that the Borings have not alleged a single fact supporting their contention that their property decreased in value, or that any decrease was due to action taken by Google. Tying any alleged damage to Google would be particularly difficult in light of the number of times the images have been published by entities other than Google.

possession of another." Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing Kopka v. Bell Tel. Co., 91 A.2d 232, 235 (1952)). Trespass is an intentional tort, which means that in order for liability to attach, a defendant must have the "intention to enter upon the particular piece of land." Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 123 A.2d 888, 891 (Pa.1956) (quoting Restatement § 163, comment b). Under Pennsylvania law, as under the general rule, a trespasser is responsible in damages for all injurious consequences which are the natural and proximate result of his conduct. See N.E. Women's Ctr., Inc. v. McMonagle, 689 F. Supp. 465, 477 (E.D. Pa. 1988) (citing Kopka 91 A 2d at 232)). See also 75 Am. Jur.2d, Trespass, Section 52.

The Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass. They do not describe damage to or interference with their possessory rights. Instead, they claim, without factual support, that mental suffering and a diminution in property value were caused by Google's publication of a map containing images of their home. While, arguendo, trespass was the "but for"cause of their alleged harm, it was not the proximate cause required to establish indirect and consequential damages.[4]

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[4] The Borings misapprehend the nature of the tort of trespass when they argue that imposing liability for trespass here is no different from doing the same when a person enters briefly upon another's land to steal a car. This example is flawed, however, because in the second case the transgressor would be held accountable, not for trespass, but for theft of the car. The tort of trespass protects interests in possession of property. Consequently, "damages for trespass are limited to consequences

The Court need not consider whether the Borings have alleged facts sufficient to support a claim for nominal damages, because the Amended Complaint does not contain a nominal damages claim.

D. The Claim for Unjust Enrichment

In order to establish a claim for unjust enrichment, a plaintiff must allege facts showing that: (1) he conferred a benefit upon the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under circumstances making it inequitable for defendant to retain the benefit without compensating the plaintiff for its value. Lackner v. Glosser, 892 A. 2d 21, 34 (Pa. Super. 2006).

The doctrine of unjust enrichment is "typically invoked . . . when plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contract." Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc., 171 F.3d 912, 936 (3d Cir. 1999) (citing Zvonik v. Zvonik, 435 A.2d 1236, 1239-40 (Pa. Super. 1981)). In this event, the law implies a quasi-contract, requiring that the defendant compensate the plaintiff for the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in

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flowing from the interference with *possession* and not for separable acts more properly allocated under other categories of liability." Costlow v. Cusumano, 34 A.D.2d 196, 201 (N.Y. 1970) (publication of photographs of plaintiffs' deceased children not actionable as trespass since claim was really based on interference with rights of a personal nature rather than for interference with rights to exclusive possession of property) (emphasis added).

quantum meruit." See Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir.1987); AmeriPro Search, Inc. v. Fleming Steel Co., 787 A.2d 988, 991 (Pa. Super. 2001) (citations omitted).

In this case, there was no relationship between the parties that could be construed as contractual. It cannot fairly be said that the Borings conferred anything of value upon Google.[6] The entire thrust of the Borings' allegations is that Google *took* something from the Borings without their consent, and should be held liable for having done so. There is, therefore, no basis for applying a quasi-contractual remedy.

The Borings argue that unjust enrichment is not an exclusively quasi-contractual remedy, but may stand alone as an independent tort. The Court of Appeals for the Third Circuit addressed this issue in Steamfitters, writing: "In the tort setting, an unjust enrichment

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[5] "Quantum meruit" is defined as "as much as deserved." Black's Law Dictionary at 1243 (6th ed. 1990). It "measures recovery under implied contract to pay compensation as reasonable value of services rendered." Id. See also Mulholland v. Kerns, 822 F. Supp. 1161, 1169 (E.D. Pa. 1993) (quoting Black's Law Dictionary).

[6] Recovery for unjust enrichment would not, in any event, exceed the particular photographs' value to Google. In framing their demand for restitution, the Plaintiffs ignore the meaning of quantum meruit, arguing that they are entitled to recover all profits made by Google as a result of its decision "not to implement controls that would prevent inclusion of imagery of private property," and the amount of reduction in costs realized by Google "by failing to implement control measures." (Doc. 18 at 22). The Borings do not cite – and the Court has not found – authority recognizing such broad-based recovery under the theory of unjust enrichment.

claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched.)" Id. 171 F.3d at 936. The Court then quoted the Restatement of Restitution:

> The desirability of permitting restitution in [tort] cases is usually not so obvious as in the cases where there has been no tort since the tortfeasor is always subject to liability in an action for damages, and . . . the right to maintain an action for restitution in such cases is largely the product of imperfections in the tort remedies, some of which imperfections have been removed.

Restatement of Restitution § 3 cmt. a (1937). The District Court for the District of New Jersey relied on Steamfitters in "treat[ing] the Plaintiffs' unjust enrichment claim as subsumed by their other tort claims, and not as an independent cause of action." Blystra v. Fiber Tech Group, Inc., 407 F. Supp. 2d 636, 645 n.11 (D. N.J. 2005). See also Pourzal v. Marriott Intern., Inc., Civ. No. 2001-140, 2006 WL 2471695, at *3 (D.V.I. Aug. 17, 2006) (dismissing unjust enrichment claim as "materially indistinct" from trespass claim). This approach is supported by the fact that the Restatement of Torts does not recognize unjust enrichment as an independent cause of action.[7]

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[7] In reaching this conclusion, the Court does not ignore the sentence included in a footnote in Flood v. Makowski, No. Civ. A. 3:CV-03-01803, 2004 WL 1908221, at *37 n.26 (M.D. Pa. Aug. 24, 2004), which reads: "An unjust enrichment claim can be an equitable stand in a tort claim [sic]." This statement does not have any bearing on the outcome of this matter. In truth, the Court

Dismissal of the Plaintiffs' tort claims favors dismissal of this claim as well.

E. The Request for Injunctive Relief

Injunction is an extraordinary remedy that should be issued with caution "only where the rights and equities of the plaintiff are clear and free from doubt, and where the harm to be remedied is great and irreparable." 15 Standard Pennsylvania Practice 2d, § 83:2 (2005). In order to establish the right to injunctive relief, a plaintiff must demonstrate, at a minimum: (1) a clear right to relief; (2) an urgent necessity to avoid an injury that cannot be compensated in damages; and (3) a finding that greater injury will result from refusing, rather than granting, the relief requested. Id. at § 83:19. See also John G. Bryant Co., Inc., 369 A.2d at 1167. Where, as here, the request is for a mandatory injunction, the standard is even more demanding than the one applied where the plaintiff seeks to impose a restraint. See Mazzie, 432 A.2d at 988.

The Plaintiffs have failed to plead - much less set out facts supporting - a plausible claim of entitlement to injunctive relief. Where not one of the other claims is sufficient to survive the Defendant's Motion to Dismiss, the assertion of a right to injunctive relief also fails.

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cannot say with certainty what this sentence was meant to convey, and, in any event, the case in which it appears is not precedential.

Conclusion

For the reasons set out above, the Defendant's Motion to Dismiss the Amended Complaint (Doc. 22) will be granted.[5]

An appropriate Order follows.

/s/ Amy Reynolds Hay
United States Magistrate Judge

Dated: 17 February, 2009

cc: Counsel of Record via CM/ECF

[5] The Court concludes that any attempted amendment would be futile.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2350

[Filed March 3, 2010]

AARON C. BORING; CHRISTINE BORING, husband and wife respectively, Appellants,	)
v.	)
GOOGLE INC., Appellees.	)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 08-cv-694)
Magistrate Judge: Honorable Amy Reynolds Hay

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, AMBRO, FUENTES, SMITH,

FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges, and PADOVA*, Senior District Judge

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: March 3, 2010
arl/par/cc: D.M.M., Esq.
G.R.Z., Esq.
D.J.D., Esq.
B.P.E., Esq.
T.O.K., Esq.

* The Honorable John R. Padova, United States District Court Senior Judge for the Eastern District of Pennsylvania, sitting by designation, limited to panel vote.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 09-2350

[Filed February 11, 2010]

AARON C. BORING and	)
CHRISTINE BORING,	)
husband and wife,	)
Appellants,	)
	)
v.	)
	)
GOOGLE, INC.,	)
a California corporation,	)
Appellee.	)
	)

Appeal from Western District of Pennsylvania
2:08-cv-00694

PETITION FOR REHEARING EN BANC REGARDING ORDER OF THIS COURT DATED JANUARY 28, 2010, AFFIRMING IN PART AND REVERSING IN PART THE ORDER BELOW DISMISSING PLAINTIFFS' AMENDED COMPLAINT, GRANTING DEFENDANT'S 12(B)(6) MOTION ON ALL COUNTS; APPEAL FROM ORDER DATED APRIL 6, 2009, DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

PETITION FOR REHEARING EN BANC
AARON AND CHRISTINE BORING

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ATTACHED: PANEL ORDER, OPINION and Cover Correspondence: M. Rendell, K. Jordan, Circuit Judges, and J. Padova (by designation), dated January 28, 2010

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I. PANEL DECISION MISINTERPRETS AND MISAPPLIES THE TWOMBLY STANDARD.

The undersigned respectfully submit that the Panel[1] misinterprets *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.[2] Notwithstanding the partial reversal of the Order below,[3] error yet remains.

1. The Twombly Standard. *Twombly* and *Iqbal* rest upon complex federal questions without federalism issues and traditional common law state causes of action. A federal court ruling on a federal question may entwine procedure and substance differently than when a federal court must restrain from creating general federal common law for a state claim.[4]

Having said that for the purpose of categorical consideration, the general pleading standard is straight-forward:

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[1] M. Rendell, K. Jordan, Circuit Judges, and J. Padova (by designation) (the "**Panel**"); Opinion, dated January 28, 2010 (the "**Panel Opinion**").

[2] *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) (Alito, Breyer, Kennedy, Roberts, Scalia, Souter, Thomas; Ginsburg and Stevens dissenting); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (Alito, Kennedy, Roberts, Scalia and Thomas; Breyer, Ginsburg, Souter and Stevens dissenting). *Twombly* and *Iqbal* referenced hereafter as, the "**Twombly Standard**."

[3] A. Hay Opinion, February 17, 2009, A7, (the "**Mag. Opinion**"). The Panel Opinion and the Mag. Opinion, referred to as the "**Opinions**."

[4] *See, Erie R. Co. v. Tompkins*, 58 S.Ct. 817 (1938).

> **A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.**[5]

The Twombly Standard was not intended to create a "**convince**"[6] or an "**I know it when I see it**" standard of pleading, or to deny access to the courts on a prejudicial conclusory basis. Yet, the undersigned respectfully submit that both Opinions effectively do just that.[7]

Both Opinions ignore assessment of crucial averments, such as the "**Private Road No Trespassing**" sign, the pleaded seclusion and the pleaded intent or disregard of Google for property or privacy. [Complaint ¶5, 6, 10, 11, 27; A30-31, A35]

Formulaically, the pleading of all types of facts is not the same, because the inherent nature of all facts is not the same.[8] There are three types of facts for pleading: elemental, compound and abstract:

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[5] *Iqbal*, at 1949; *see, also,* guidance of the four-justice dissent, at 1959 ("the [basis for dismissal] lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel...")

[6] See Borings' Br., at 20.

[7] *See,* Mag. Opinion, at pg. 4, A7, Borings Br., at 5; the Panel Opinion is addressed *infra*.

[8] *See*, Fed. R. Civ. P. 9

1. Elemental. The grass is green; the nose is broken. Without calling into the analysis existential philosophy or high-science (such as "is it really green?," a spectra scope or a doctor), these facts are self-evidencing.

2. Compound. The man was drunk; there is an agreement. These facts are conclusory. They rest on elemental facts at some tier. The man had alcohol on his breath and was wobbling. On October 31st, the man told me to paint the door.

3. Abstract. Love and deep love; hate and despise; anger and outrage; offense and high offense. These are facts, but they do not necessarily have simply-reduced elemental components, since, by their nature, they have unlimited particular implementations, which themselves may be abstract. Abstract facts are doubly if not impossibly analytically capable of objective degree separation. That is, how many degrees of love and hate are there? When does "offense" become "high offense"? Ultimately, the fact requires subjective judgment by a trier of fact, possibly with an expert report. These facts, by their very nature, press themselves as trial questions because, unless the claim element is exacting for purposes of demurrer, they beg, such as it is, "I know it when I see it" confusion.

The Twombly Standard implicitly sets forth "common sense" factors:

1	Is the fact elemental,	"High offense" and "mental suffering" are

	compound (conclusory) or abstract?	abstracts. In *Twombly*, the "agreement" is a compound.
2	Does the defendant need the benefit of more facts to frame a defense?	Will the required fact change the nature of the response by the defendant. In *Iqbal*, the pleading standard was pursuant to the federal statute using a statutory term of art. Not existing in this case: irrespective of additional facts for mental suffering or offensiveness, Google's response is materially substantively unchanged.

3	Does the fact "possibly" flow from conduct averred; is it "plausible" (suggested); is it "contradicted"?	Mental suffering and high offense can occur for a trespass.[9] More so, trespass that infringes a pleaded seclusion interest and is wrapped into the context of worldwide publication derived from the trespass, is tantamount to a million eyes of invasion.
4	Does the fact relate to conduct (cause) or damage (effect)?	Notice of the averred conduct [*Twombly, Iqbal*] is distinct from notice of damages, often a function of post-discovery with the aid of experts.
5	Is there an equally plausible alternative that	Google was on the Borings land, took pictures and commercialized, as it

[9] *See Jacque v. Steenberg Homes*, 209 Wis. 2d 605; 563 N.W.2d 154, 159-162 (1997) (emphasis added). ("Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like [defendant], who refuses to heed no trespass warnings...."), emphasis added. It is reasonable, and easy to imagine, that resentment, mental suffering and high offense can exist per the Wisconsin Supreme Court framework of dueling and someone willing to injury or kill.

	creates facial 'ambiguity?	intended.
6	Is there a claim to the scope of statutory intent or public policy?	Particularly with statutory causes of action, there may be a need to plead into or over a governmental interest.
7	Is the cause of action federal or state based?	Federalism issues require deference to general federal common law, such as, creating *de facto* state claim elements. Importantly, federal use of state case law with fact-pleading must separate the claim element standard from the pleading standard.
8	If the fact is abstract, is there objective legal clarity on satisfaction of the claim element, thereby making the fact elemental? Is the fact request tantamount to	Is the court's requirement tantamount to creating an implicit element in violation of general federal common law. For example, does a plaintiff have a reasonable basis for satisfying or "convincing" the

	fact pleading or "magic words"?	court, apart from notice to the defendant for the claimed conduct. What is the appropriate pre-evidentiary objective pleading standard, and where is that standard articulated: for example, does the federal standard to survive a 12(b)(6) demurrer require pleading of taking aspirins, more, different or less.
9	Is the quality of fact a matter of degree or a bursting bubble for satisfaction of the element?	Compare loss of consortium prior to legal recognition; the existence of the fact did not permit relief. Here, the facts are claimed by the court to be "not good enough" to "convince" the court.

Moreover, pleading demands for abstract facts is inherently a slippery slope, as demonstrated by the Magistrate Judge's own admission:

> **[I]t is easy to imagine that many whose property appears on Google's virtual maps resent the privacy implications..."[10]**

"Resent" means "to have a feeling of pain or distress..." "Suffering" means "the bearing of pain or distress."[11] The Supreme Court did not intend to deny access on such pre-evidentiary hair-splitting distinctions.

2. Error in Dismissing Privacy Count.

The Panel Opinion states, at pg. 8:

> **Publication is not an element of the claim, and thus we must examine the harm caused by the intrusion itself.**
>
> **No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there.**

i. Error by Misapplication of *Borse*.[12] A plain reading of the Panel Opinion states that "publication

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[10] Opinion, at 4, A7; *see, infra.* n. 9.

[11] Oxford English Dictionary (Online Subscr.), Second Ed. 1989.

[12] This Court will note that the Panel uses *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 247 (Pa. 2002), quoting a statement of the required averment in a fact-pleading jurisdiction. The Panel does not analyze or distinguish the element for purposes of liability from the pleading difference under the Federal Rules.

is not an element of the claim" apparently for the proposition to ignore and to dissect publication from the claim. The conclusion does not follow the premise, it inverts it. This is clear error and confuses the interpretation of *Borse*.

The concept to remove the "expanse of view"[13] from an invasion of privacy claim is not comprehensible. The expanse of view is the counterweight of the expectation of privacy. It is seclusion from the expanse of the view. Privacy seclusion is relative to a view or intrusion. It does not follow that, because I live on a cul-de-sac with an occasional driveby, means that I expect the million eyes of a televised daily New York parade. [Borings' Reply Br., at 11; n. 21, *supra*]

ii. Error by "Door Knock" Immunity. The Panel Opinion concludes that a claim for trespass and worldwide publication of data is less than a door knock and, therefore, Google is immune. The Panel changes the facts and rules on an entirely different context argumentatively, in clear error to the Twombly Standard. Although it may be subtle, the Panel discloses prejudice on the merits apart from the Borings' filed pleading.

iii. Error by the "Fleeting Presence" Immunity. The amount of time necessary to do the averred injury is immaterial; it is clear error to assert otherwise. There is no basis to assert that the time of presence is insufficient intrusion when the result of that presence is recorded with worldwide publication. Injury can be done in a nanosecond. Google profited

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[13] *See* Borings Reply Br., at 11.

until its conduct was discovered.[14] The Panel describes the presence as "fleeting," but that term is not supported in the pleading at issue.

iv. The Conclusion Begs the Trial Question. All that remains in the Panel Opinion is exactly the draconian conclusory determination that begs the ultimate trial question, as a matter of law, without evidence:

> **No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there.**[15]

The Panel clearly admits its error, ignoring pleaded seclusion, trespass and a "**Private Road No Trespassing**" expectation of privacy:

> **It is plausible that a reasonable person *could be* highly offended and incur mental suffering, shame or humiliation, having discovered that someone recently entered onto secluded private property, took 360° pictures within and while close-up on the driveway close to the home and swimming pool, while trespassing, after also trespassing and driving far down a privately maintained road and past "Private Road No Trespassing" signage,**

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[14] *See*, Borings Br., at 7.

[15] Panel Opinion, at 8, emphasis added.

> **having commercialized the pictures, as intended by the trespass, with publication throughout the world via the trespasser's pervasive proprietary index system.**

The Panel's use of fact that it is "ungated" may be Google's argumentative defense, but it is certainly not plaintiffs' averment. The Twombly Standard is not a *carte blanche* for dismissal for what a court may believe is a better argument or better facts. Dissection of the context, and ignoring pleaded facts, is clear error. The undersigned is respectfully trying to assess the claim element: as a matter of law, would a blinking "**Private Road No Trespassing**" sign satisfy the element? Should the required gate be locked? Is a guard dog an equivalent to a gate? What exactly is the objective federal law claim element for reference to survive the "so what" of a demurrer and allow the claim to pass?[16] The Panel creates the new general federal element of a required "gate."

v. Other Examples of Case Law. The Panel issued a non-precedential opinion, then cites to lower courts.[17] The lower courts are presumably acting in accordance with the precedent that should be

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[16] *See also*, Panel Opinion, at 9. The existence of "relevant factors," such as viewing inside the home on the merits, does not defeat plaintiffs' pleading. Once again, it does not follow that the failure to find a relevant factor means that the pleaded factors are finally adjudicated on the merits or may be ignored. *Pacitti v. Durr*, Civ. A. No. 05-317, 2008 WL 793875 (W.D. Pa. Mar. 24, 2008), aff'd, 310 F. App'x 526 (3d Cir. 2009), is another inapplicable example; dismissal was based upon truth as a defense.

[17] Panel Opinion, at 9.

established by this Court as a case of first impression, causing an endless loop of non-authority. *E.g.*, the Panel citing to *Diaz*[18] for the proposition that the district courts sustain cases for "highly offensive"[19] is non-responsive as a pleading standard in this case: courts uphold and dismiss cases in their own contexts.[20] As set forth in the Distinction Table,[21] no case is comparable to this: there is no case that has both two key elements that are here intertwined and unseparable: trespass and worldwide publication.[22] Controlling case law is not cited because it is not known to exist. Offense and outrage in the privacy

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[18] *Diaz v. D.L. Recovery*, 486 F.Supp. 2d 474, 475-480 (E.D. Pa. 2007).

[19] Panel Opinion, at n. 4, pg. 9: "**[W]e note Google's assertion, which is not seriously contested by the Borings, that the Street View photograph is similar to a view of the Borings' house that was once publicly available online through the County Assessor's website.**" That is incorrect. The Borings contest any reliance upon an unconstitutional entry on, and surveillance of, their property by a government agency as any basis for adjudication herein. Allegheny County's removal of the picture tacitly admits it is not permitted to publish data that taken by illegal entry. It suggests extrinsic evidence that is not properly qualified is unreliable.

[20] *See Wolfson v. Lewis*, 924 F. Supp. 1413 (1996 E.D.Pa), Borings Reply Br., at 13 ("a court should consider all of the circumstances ..."), *citing, Hill v. National Collegiate Athletic Assoc.*, 7 Cal. 4th 1, 865 P.2d 633, 648 (Ca. 1994) [following evidentiary hearing] (emphasis added). The Panel Opinion identifying examples of cases is not a replacement for proper analysis of the facts actually pleaded in this case.

[21] See Borings' Reply Br., Addendum A.

[22] Id.

count are serviced and supported by the trespass. The Panel Opinion merely identifies other cases which have their own particular facts, and doing so is not a proper analysis of legal principles applied to plaintiffs' pleading. For example, in neither of the Opinions does the court analyze and articulate the obvious meaning of the "**Private Road No Trespassing**" sign, which would make the claim more plausible. The fact is ignored in clear error.

3. **Error in Dismissing Punitive Damages.**

The Panel states:

> **The Borrings' [sic] complaint fails to allege conduct that is outrageous or malicious. There is no allegation that Google intentionally sent its driver onto their property or that Google was even aware that its driver had entered onto the property. Moreover, there are no facts suggesting that Google acted maliciously or recklessly or that Google intentionally disregarded the Borings' rights.**

The undersigned most respectfully asserts that the above is legally incomprehensible pursuant to Fed. R. Civ. P. 8. It demonstrates how far the Twombly Standard is misinterpreted: *Twombly* is now the unintended standard for conclusory opinions, prejudice and the creation of unintended elements and burdens of proof at the pleading stage. [See Complaint ¶¶6, 11, 27 A30-31, A35.]

The Borings have secured a valid claim for intentional trespass. Google is the driver, and its

driver was trespassing onto secluded property, taking the pictures it intended to take for the benefit of its commercial enterprise, not requesting opt-ins, and publishing the illegal fruits of the trespass for its enrichment. Google drove past the clearly marked "**Private Road No Trespassing**" sign, and, with nowhere to go but to drive into the pool, turned around in the driveway, drove back and published the pictures anyway, worldwide.

Under the Twombly Standard, it is clearly error to determine that Google is immune from trespassing with intentional disregard or recklessly when expressly pleaded. [*See*, Complaint ¶¶6, 11, 27; A30-31, A35] If the Panel Opinion element is to be facially understood, it appears that would-be tortfeasors are immune from liability for being generally reckless, such as being immune to the particular person hit for intentionally or recklessly shooting a gun into a crowd. Moreover, the Panel denies the legal right to acquire or to present evidence of intention. A plaintiff should not have to plead work product or evidence to plead its general claim of the defendant's intention and/or reckless disregard. Requiring it is clearly error.

Regarding the use of *Jacques*,[23] undersigned understand the point of the stated Barnard Rule. As expressly stated, "the Supreme Court of Wisconsin also eloquently stated the socio-philosophical policy behind punitive damages in a trespass count."[24] It speaks well

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[23] Borings' Br., at 29.

[24] Id.

for itself and the importance of punitive damages in a trespass action.

Finally, damage claims can be dismissed in state court "in advance of trial."[25] But, it is clearly error for the Panel to immunize Google for its profit activities by attributing intention against the inference to which the Borings are entitled. For purposes of pleading, the plausibility regarding intention speaks for itself: Google is not supposed to be on the Borings' land or pass the "**Private Road No Trespassing Sign**."

4. Error in Dismissing Unjust Enrichment.

Data is the new oil. If an oilman trespassed onto my land, took my oil and commercialized it for a profit, I would have a claim not only for the trespass but also a claim for the commercialized value of the oil. The obligation to pay is implied because the use is for a commercial profit by the taker. If an oilman can take oil from a public domain source, that is not at issue in this case. But if the oilman trespasses onto my land to take my oil, he is liable for its value. That is simply fair. Each property owner is entitled to extract any and all value from their own private investment in their land.

The value of the oil remains to be determined. But, we know that each generation has its clever buyer who knows the ultimate value, but would never, of course, admit the value. Land for beads.

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[25] The Panel cites to *Phillips v. Cricket Lighters*, 883 A.2d 439, 445, 447 (Pa. 2005), a post-evidence summary judgment ruling.

> **The complaint does not allege, however, that the Borings gave or that Google took anything that would enrich Google at the Borings' expense.**[26]

This is a conclusion not supported in the pleadings. The Panel cannot, at the pleading stage, without the aid of the information provided by discovery rule as a matter of law, make value determinations regarding the value of the extracted data in Google's hands.[27] The Borings properly satisfy the elements of the state-law claim, and the same have been pleaded: (1) benefits conferred on Google; (2) appreciation of such benefits by Google; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Lackner v. Glosser*, 892 A. 2d 21, 34 (Pa. Super 2006). If Google extracted data acquired from the Borings' land, the Borings are entitled to the fair value, and have clearly pleaded a plausible claim.

5. Error in Dismissing Equitable Relief.

In denying the right to claim equitable relief, the Panel stated:

> **The complaint claims nothing more than a single, brief entry by Google onto the Borings' property. Importantly, the Borings do not allege any facts to**

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[26] Panel Opinion, at 14.

[27] Google is enriched by use of the wrongfully acquired data. See Amended Complaint, ¶¶27-28, A35.

> **suggest injury resulting from Google's retention of the photographs at issue, which is unsurprising since we are told that the allegedly offending images have long since been removed from the Street View program.** [Panel Opinion, at 15-16, emphasis added.]

As the Panel reviewed *de novo,*[28] the undersigned has been unable to reference in the record the circumstances under which the Panel was "told" anything about particular "offending images" or that the entry was "single" or "brief." The Panel Opinion does not provide references, nor are those facts in the Amended Complaint. The offending images, as claimed in the Amended Complaint, are all images taken while trespassing on the Borings' property. [Amended Complaint, 21-22; A33] Exactly for the reasons stated in this appeal, plaintiffs have not had the opportunity to discover, adduce evidence and/or reference exactly what images are in Google's possession, irrespective of publication; therefore, plaintiffs themselves do not yet completely know of the scope of the offending images. There is no proper record indicating Google only appeared one-time, for how long, and whether any other pictures exist containing the Borings and/or their swimming pool guests of various ages.

That said, a "single, brief entry" is all it takes to injure, and, in a digital world, to continue to injure or risk injury. As stated in Borings' Br. at 31 and Reply Br., at 18, the original digital picture remains available on Google's worldwide computers, and the

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[28] Panel Opinion, at 5.

claim for a destruction order is appropriate under the Twombly Standard. There is a distinction between the publicized data and the unredacted retained data that is expressly disregarded as a matter of law by the Panel. Formulaically, let us take a hypothetical situation, testing the metes and bounds of the Panel rationale:

> **The streets of a low-rent neighborhood. It is a 90° day in August. Children are playing in a rarely travelled dead-end street. The proverbial fire hydrant is uncapped and the children are running past it. Children are in their underwear instead of more modest swimwear.**
>
> **In a "single, brief" drive-by, a "Street Watch" car drives by. The Street Watch car records the children in their wet underwear because, "it records what anyone would see on the street." This recording is stored on the Street Watch disks. The original source images of the children are replicated and distributed on computers distributed throughout the world.**
>
> **Technicians necessarily have access to these pictures. There are thousand of technicians working on the project. As a matter of statistical probability, some technicians may have predatory inclinations and the original source pictures are subject to mischief. Later, one of the children becomes President of the United States, which creates interest for a**

> **specific archived picture, which could yield a lot of money in certain markets.**[29]

The point is that the pictures are subject to continued misuse and mischief, and there should be a right to *claim* an equitable injunction order for destruction under penalty of law. Removal from public view is not a solution. Google must endure the destruction of the poison fruit of the tree. The greater the destruction burden, the more the admission of widespread distribution. Google could eliminate the risk and cost of a destruction order by electing an "opt-in" program, but it purposefully does not do so. [Borings' Br., at 7]

If removal from public view is the formula for relief, then the injured party whose picture exists has no further remedy. How does removing from public view solve the risk: the pictures are replicated and archived. It might be that the Panel holds, through the creation of a new implied element for *claiming* equity, that the picture must be human being as a matter of law, but what if the pictures look like a winter-wonderland scene with a holiday card scene? What exactly must be *pleaded* to have a pre-evidentiary hearing injunction *claim* survive when the conduct of trespass and publication virtually admitted?

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[29] *See, e.g.*, http://googlesightseeing.com/2009/03/24/naked-people-on-googlestreet-view.

II. PANEL FAILS TO ADDRESS PROPRIETY OF EX PARTE "GOOGLING" BY THE MAGISTRATE JUDGE

1. Error in Failure to Properly Address Googling.

The Magistrate Judge was *ex parte* "googling."[30] The undersigned respectfully submit that the action prejudiced the Magistrate Judge's determination on the merits, and that prejudice appears to have ascended to the Panel, notwithstanding a *de novo* review.

Either: a) the act of *ex parte* googling is improper; b) *ex parte* googling is proper, or c) is immaterial and condoned by this Court when the *ex parte* googling is sequentially stated in an opinion after a purported conclusion.[31] The Panel stated:

> **The Borings also suggest that the Court erred in expressing skepticism about whether the Borings were actually offended by Google's conduct in light of the Borings' public filing of the present lawsuit. However, the District Court's comments came after the Court had already concluded that Google's conduct**

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[30] Mag. Opinion, at 4-5, A7-8.

[31] Panel Opinion, at 10 (compounded use of defendant's own services not addressed). *See,* www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (ABA Model Code of Judicial Conduct); Ind. Code of Judicial Conduct Rule 2.9(C) (no independent investigation in any medium, including electronic).

> **would not be highly offensive....** [Panel Opinion, at 10]

First, the use of the term "skepticism" is a minimizing characterization for a highly serious issue of *ex parte* research. Second, the Panel appears to purposefully avoid the clarity of situation: the Magistrate Judge was "googling." The reference merely to the public filing statement is neither accurate nor complete as stated. It is "especially true" that the Magistrate Judge's "googling" underpinned multiple errors.[32]

Third, we know the methodology of decision-making is not necessarily — if ever — sequential; it is circular, drawing forward, backward and around until a conclusion is derived on a rational basis of consideration, contemplation and reflection. Grammatical structure must necessarily put sentences into a sequence. In no way does it follow that the fact that sentences are necessarily in a sequence reflects the deliberative process underpinning the *ex parte* substantive conduct of a trial judge. Even so, the location of the "googling" language in the first privacy section sequentially preceded the second part of the same privacy count which addresses viability and other comments by the Magistrate Judge.

2. Ascension of Googling Prejudice.

The undersigned believes that the "googling" error ascended to the Panel. For example, on the trespass

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[32] See Borings Br., at 5; Hays Opinion, at 4, A5 ("This is especially true").

claim, for which serious error was determined, the Panel nevertheless frames the error in a coddle, to wit:

> **While the District Court's evident skepticism about the claim may be understandable, its decision to dismiss it under Rule 12(b)(6) was erroneous.** [Panel Op., at 12.]

Why understandable? What is the pre-evidentiary basis for the Panel statement? What is the purpose of a predicate that gives the appearance of a favor to an seriously errant lower court or a strictly liable defendant? The framing predicate is injurious, superfluous, unnecessary and prejudicial.

1) Liability and damage are the basis of a "claim." 2) The "skepticism" means doubt on the claim, which is doubt to liability and/or damage. 3) For trespass, damage is not part of the prima facie claim, so it cannot be skepticism as to the pleading of damage. So, it must be, therefore, skepticism as to liability. But, strict liability is admitted by the Panel. So, it cannot be on that point either. 4) That leaves one thing: prejudice as to the final adjudication of the claim. If the Panel is asserting doubt on damages for the "claim" as would be ultimately determined after trial, then it is an admission of prejudice, as well as terribly wrong, since some damage is always presumed in trespass by operation of law. Accordingly, the Borings seek rehearing en banc.

Date: February 11, 2010

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STATEMENT OF COUNSEL PURSUANT TO L.A.R. 35.1

I, the undersigned, make the following representation, in accordance with 3rd Cir. L.A.R. 35.1 (2008):

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court in *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) and the Supreme Court in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955

(2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), and that this appeal involves a question of exceptional importance as it summarily denies the right to a trial.

Furthermore, I express a belief the "googling" of trial judge "so far departed from the accepted and usual course of judicial proceedings" that this court's supervisory power is called for and the Panel did not acknowledge the act, as such, for a determination of propriety.

Date: February 11, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITION FOR REHEARING EN BANC** was filed electronically with the Court on the 11th day of February, 2010, and I believe that notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system, including the following counsel of record for Appellee:

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